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Promotion and protection of the rights of children

The sale of children, child prostitution and child pornography

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly, in accordance with resolution 64/146, the report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Najat Maalla M'jid.

* A/65/150.



Report of the Special Rapporteur on the sale of children, child prostitution and child pornography

Summary

The present report is being submitted pursuant to General Assembly resolution 64/146 and is the first report submitted to the Assembly by the current Special Rapporteur. It describes the activities undertaken from September 2009 to July 2010 in the discharge of the mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography.

In the context of the tenth anniversary of the adoption of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, the present report focuses on remaining challenges with respect to awareness and understanding of these problems and the actions undertaken to address them. The recommendations of the Special Rapporteur set out specific measures to improve the effective implementation of the Protocol: a better understanding and greater awareness for better action.

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I. Working methods and activities

A. Working methods

1. In its resolution 64/146, the General Assembly requested the Special Rapporteur on the sale of children, child prostitution and child pornography to submit reports to the General Assembly and the Human Rights Council on the activities undertaken in the discharge of her mandate. The present report is being submitted pursuant to that request. It deals with the activities undertaken from September 2009 to July 2010. Furthermore, in the context of the tenth anniversary of the adoption of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, this report will focus on remaining challenges to improving the effective implementation of the Protocol.

B. Activities

1. Country visits

2. Since her last report to the Human Rights Council in September 2009, the Special Rapporteur has visited the United Arab Emirates (12-18 October 2009) and Senegal (21-30 October 2009). The Special Rapporteur's preliminary observations on these visits are contained in press statements.^{1,2} The Special Rapporteur will make an official visit to El Salvador in August 2010 and to the United States of America in October 2010.

2. Human Rights Council

3. In September 2009, the Special Rapporteur submitted her annual report to the Human Rights Council at its twelfth session on the subject of child pornography on the Internet. The report includes reports on her visits to Latvia and Estonia³ and a summary of her communications to Governments and the replies she received between 1 December 2007 and 30 April 2009.⁴ The Special Rapporteur will submit her next annual report to the Human Rights Council at its sixteenth session in March 2011.

3. Conferences, seminars and engagement with civil society

4. The Special Rapporteur also participated as a panellist in numerous conferences and seminars during the period under review: the Rome conference on violence against women, in preparation for the Group of Eight (G-8) summit; the conference of the Organization for Security and Cooperation in Europe (OSCE) on the prevention of modern slavery, held in Vienna; a side event to the commemoration of the twentieth anniversary of the adoption of the Convention on the Rights of the Child, held in Geneva; a United Nations Cultural, Scientific and

¹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9544&LangID=E> (United Arab Emirates).

² <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9864&LangID=F> (Senegal).

³ A/HRC/12/23/Add.1 and Add.2.

⁴ A/HRC/12/23/Add.3.

Cultural Organization (UNESCO) colloquium on street children; the working group on the feasibility of an additional protocol to the Convention on the Rights of the Child on a communications procedure; conference on the cultural rights of the child; the launching of the campaign for the universal ratification of the two additional protocols to the Convention on the Rights of the Child organized in New York by the Office of the Special Representative of the Secretary-General on Violence against Children, the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, the Office of the United Nations High Commissioner for Human Rights and the United Nations Children's Fund (UNICEF); a regional workshop on the protection of children affected by mobility in West Africa organized in Dakar by a regional platform of eight agencies and regional non-governmental organizations (NGOs); and a national seminar on legal mechanisms for children organized in Rabat by the Advisory Council on Human Rights. She also visited programmes and met with stakeholders involved in child protection in Montreal and London.

II. Optional Protocol on the sale of children, child prostitution and child pornography: 10 years later

A. Introduction

5. The Optional Protocol on the sale of children, child prostitution and child pornography ("the Optional Protocol") is of course a valuable tool for strengthening the protection of children and efforts to put an end to offender impunity. It would be even more effective if all States would ratify it and strive to implement its provisions effectively.

6. It is the intent of the present report to highlight remaining challenges with regard to knowledge and comprehension of these phenomena and child protection, in order to promote an enhanced understanding and especially to propose specific measures to improve effective implementation of the Protocol: a better understanding and greater awareness for better action!

7. The Special Rapporteur drafted this report on the basis of an analysis of various periodic reports submitted by States to the Committee on the Rights of the Child, the Committee's recommendations and comments, reports submitted by States as part of the Universal Periodic Review, the reports of previous rapporteurs, country visits made by her and her predecessors, reports and studies of United Nations agencies, the Council of Europe and studies by international organizations.

8. Particular attention was paid to follow-up to the recommendations made by the above-mentioned mechanisms as well as to those of the United Nations study on violence against children, the Millennium Development Goals and the Rio de Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents of World Congress III against the Sexual Exploitation of Children and Adolescents, held in Rio de Janeiro, November 2008, which commits Governments to pursue a set of specific, time-bound goals to prevent the sexual exploitation of children and adolescents, to put an end to the practice and to protect exploited children.

1. The origins of the Protocol

9. The Optional Protocol was adopted and opened for signature, ratification and accession pursuant to General Assembly resolution 54/263 of 25 May 2000. The Protocol entered into force on 18 January 2002.

10. This Protocol supplements the Convention on the Rights of the Child, which is the key international instrument for the protection of the rights of children, and in particular the right to be protected from all forms of abuse, violence, abandonment and exploitation (see in particular, article 34 of the Convention on the Rights of the Child, which recognizes the right of children to be protected from all forms of sexual exploitation and sexual abuse and that all exploited children are rights-holders under the Convention on the Rights of the Child, especially with regard to recovery and reintegration under article 39).

2. Provisions of the Optional Protocol

11. Article 1 of the Optional Protocol establishes that States parties shall prohibit "the sale of children, child prostitution and child pornography as provided for by the present Protocol".

12. Article 2 defines conduct prohibited by the Optional Protocol and is closely linked with article 3, which lists the actions which, as a minimum, must be "fully covered" under the criminal or penal law of States parties:

- **Sale of children.** Any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration; article 3, paragraph 1 (a) prohibits offering, delivering or accepting a child for the purpose of sexual exploitation; transferring a child's organs for profit; subjecting a child to forced labour; or obtaining consent to adopt a child in violation of applicable international legal instruments on adoption;
- **Child prostitution.** The use of a child in sexual activities for remuneration or any other form of consideration;
- **Child pornography.** Any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

13. The obligations of States parties contained in the Optional Protocol also concern the suppression of these crimes, covering questions such as extraterritorial jurisdiction, extradition and mutual legal assistance, as well as seizure and confiscation of proceeds and goods (articles 4 to 7). Article 8 concerns the protection of victims, article 9 has to do with prevention and article 10 with international cooperation. Implementation of the Optional Protocol must take into account the general principles of the Convention on the Rights of the Child, that is, the right to non-discrimination (article 2); the best interests of the child (article 3); the right to survival and development (article 6); and the right of the child to express his or her own views freely in all matters affecting the child and to have due weight given to those views (article 12).

3. The Optional Protocol and other treaties

14. Other international and regional instruments to which many States are party supplement the provisions of the Protocol, thereby emphasizing the indivisibility and interdependence of rights.

B. Knowledge and understanding of the phenomena

1. Extent and trends over time

15. Numerous studies and situation analyses have been carried out by some States, associations, NGOs and multilateral agencies on violence and some forms of sexual exploitation of children, forced labour and trafficking in children and unaccompanied minors. Data gathering and processing systems have been established in many countries and between certain countries.

16. Thanks to these efforts, more data are now available on long-term trends and specific aspects of some types of sale and sexual exploitation of children, including:

- The practice of sexual exploitation of boys and girls of all ages, and from all backgrounds, in all States and regions;
- An increase in some types of sexual exploitation of children and adolescents perpetrated over the Internet and using new technologies, and facilitated by increased mobility through travel and tourism;
- An increase in sale of children for the purposes of trafficking, sexual exploitation, forced labour and illegal adoption;
- The exacerbation of these phenomena due to poverty, the HIV/AIDS pandemic, conflicts, large-scale natural disasters and displaced persons;
- The gender dimension of sexual exploitation, which has the greatest effect on girls, although there are reports of some cases of sexual exploitation of boys (prostitution, pornography, sexual tourism); very few cases have been reported owing to taboos and laws prohibiting homosexuality;
- The global dimension of increasing clandestine, lucrative global criminal activity, which is also increasingly organized;
- The persistent demand for child sexual services, supported by an environment of tolerance, complicity and impunity.

17. However, the actual extent of all forms of sale (in particular, sale for the purpose of illegal adoption or transfer of organs) and sexual exploitation of children remains difficult to assess, for the following reasons in particular:

(a) The difficulty of interpreting certain concepts and interdependence between certain forms of exploitation

18. The scope of application of the Optional Protocol is not always properly interpreted, and, as a result, neither are its concepts.

Sale of children

19. The actual extent of and long-term trends in the phenomenon of the sale of children as defined in the Optional Protocol are very difficult to assess, on the one hand because interpretation and comprehension of the concepts are not always very clear and, on the other, because there are often links between sale, trafficking, forced labour and the sexual exploitation of children.

Sale of and trafficking in children

20. States have a tendency not to distinguish between the sale of children and trafficking in children, despite the recommendations of the Committee on the Rights of the Child, which clearly stipulate that the two terms should not be used inappropriately.⁵ In fact, although trafficking in and sale of children are overlapping concepts, they are not identical, and article 35 of the Convention on the Rights of the Child requires States parties to take measures to prevent trafficking and sale. The Handbook on the Optional Protocol published by the UNICEF Innocenti Research Centre provides clarifications in this regard.

Sale of children for the purpose of sexual exploitation

21. The fact that States often do not distinguish between sexual exploitation and sexual abuse, particularly within the family, has been raised by the Committee on the Rights of the Child⁶ and by the Special Rapporteur during country visits. In the context of the Optional Protocol, sexual exploitation covers the use, recruitment or offer of a child for purposes of prostitution or pornographic material or performances.

22. Other practices such as forced marriage that are in effect in certain parts of the world can be considered "sale for purposes of sexual exploitation". One manifestation of this, among others, is that young girls are given as wives to men — often older men — in exchange for money.

Sale of children for the purpose of forced labour and recruitment of children for use in armed conflict

23. Article 3 of the Optional Protocol also specifically requires States parties to prohibit the sale of children for the purpose of their engagement in forced labour and in the worst forms of labour.

24. This includes the "forced or compulsory recruitment of children for use in armed conflict" (pursuant to Convention No. 182 of the International Labour Organization (ILO) on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour). The Committee on the Rights of the Child⁷ has found that the sale of children for use in armed conflict is covered by this provision of the Optional Protocol. The Committee has also found that the sale of children for use in camel racing can be considered to fall under the prohibition of the sale of children for their engagement in forced labour.

⁵ *Report of the Committee on the Rights of the Child, Sixty-third Session, Supplement No. 41* (A/63/41).

⁶ *Ibid.*

⁷ *Ibid.*

Sale of children for the purpose of organ transfers or illegal adoption

25. Article 3 of the Optional Protocol defines the sale of children for the purpose of organ transfers as "offering, delivering or accepting" a child for the purpose of "transfer of organs of the child for profit".

26. Lastly, article 3 of the Optional Protocol also defines the sale of children for the purpose of illegal adoption as "improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption".

Child prostitution

27. Article 2 of the Optional Protocol defines child prostitution as "the use of a child in sexual activities for remuneration or any other form of consideration". The phrase "any other form of consideration" means that prostitution includes offering sexual services in exchange for goods, services or favours, as well as for money. That includes, for example, the exchange of sexual services for food, lodging or drugs.

28. Sex tourism involving children (the sexual exploitation of children by one or more persons travelling within their own country or to another, usually less developed, country in order to engage in sexual activities with children), while not clearly identified as an offence under article 3 of the Optional Protocol, is mentioned in the preamble and in article 10 on international cooperation. Sex tourism is directly linked to the offences covered by the Optional Protocol because it often involves child prostitution and child pornography (pimps often film children performing services) and may also involve the sale of children.

29. The definition of "child" in article 1 of the Convention on the Rights of the Child also applies to the Optional Protocol. Some countries define a child as an individual under the age of 18, but others take into account the age of criminal responsibility or the age of consent to sexual activity, which may vary between 13 and 16. In countries where prostitution is legal, the sexual exploitation of children who have reached the age of consent is not considered an offence and therefore such children are not identified as victims. In countries where prostitution is illegal, children who have reached the age of criminal responsibility and who are not found to have been the victims of pimps or traffickers are treated as offenders.

Child pornography

30. Article 2 of the Optional Protocol defines child pornography as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes". This may be images showing children engaging in sexual activities with other children or with adults (hard pornography), but it may also be "provocative" images of naked minors that emphasize their sexuality (soft pornography).

31. Images in which various special effects or computer-based techniques are used to replace images of adults with images of children (morphing), or even cartoons, may also constitute pornography. Although such images are artificially created, they appear real and therefore have the same effect on the consumer.

32. Many kinds of media are used: live shows, photographs, films, compact discs (CDs), digital images recorded or distributed over the Internet or on mobile phones, social networks, as well as cartoons. The development of new technologies, which exponentially increases the opportunities to obtain, disseminate and sell this criminal material, has fostered worldwide growth in child pornography. These new technologies considerably broaden the scope of predators' activities by allowing them to stalk, recruit and exploit children all over the world. In chat rooms and blogs, child pornographers take advantage of their anonymity in order to solicit children for sexual purposes (grooming by means of information technology).

Interlinkages to be considered

33. Despite their clear definitions, concepts often overlap. There are many links between the sale of children, trafficking in children, forced labour, child prostitution, sex tourism and child pornography. The exploitation of children for economic purposes often goes hand in hand with their exploitation for sexual purposes. The development of sex tourism almost invariably entails the development of child prostitution and child pornography (some abusers film their victims). In conflict zones, the recruitment of children for armed conflict is very often accompanied by the sexual exploitation of children, especially girls.

Summary

34. The question is not how to categorize these offences, but whether the responses to them, in terms of the protection of children and the punishment of offenders, are adequate and comply with the provisions set out in the various international instruments to which States are parties.

(b) Small number of reports and statements

35. The relatively few statements and reports filed does not reflect the actual extent of these offences and can be explained by the following:

- Inadequacy of some legislation that is not fully harmonized with the international instruments that have been ratified and does not clearly define offences;
- Failure to have recourse systematically to the police and the justice system owing to:
 - lack of proper physical and human resources;
 - the slow pace and cost of judicial proceedings;
 - lack of awareness of the laws among children, families and communities;
 - in some cases, lack of confidence in the justice system;
 - the impunity of some offenders;
 - fear of retaliation, stigma or social exclusion;
 - lingering forms of cultural resistance;
 - recourse to amicable settlement in some rural areas.

- Lack of redress and follow-up mechanisms for the promotion and protection of rights of the child that are easily accessible to all children and guarantee their protection;
- The clandestine nature of these offences.

(c) Scarcity and unreliability of data

36. The actual extent of these offences is not yet known because statistics are scarce and often unreliable owing to the following:

- Large differences in numbers: the figures vary, ranging from a few cases to millions of children affected, based on information received from countries and on studies conducted by various institutions. These are often estimates;
- The quality of the methodology used in analysing the data;
- Inadequate information systems: many countries still do not have centralized information systems that use a clear and harmonized methodology for the gathering and processing of data at the country level;
- Mechanisms for the follow-up and evaluation of the child rights situation are weak; evaluation of the impact of actions undertaken is also weak as a consequence;
- The difficulty of ensuring international and regional coordination of the exchange of information.

Summary

37. The actual scope of the sale of children, child prostitution and child pornography remains difficult to determine. We must step up our efforts to address these gaps, because well-publicized legislation that clearly defines these offences, easy access to the justice system and to redress and follow-up mechanisms for the promotion and protection of the rights of the child, reliable information systems and effective coordination of the exchange of information will improve the prospects of achieving concrete results in the protection of children.

2. Critical factors and vulnerabilities

38. A number of interacting factors increase children's vulnerability to sale and sexual exploitation. These factors are linked to the political, institutional, legislative, socio-economic and cultural context in which a child lives and develops, as well as the global context (see diagram below).

<i>French</i>	<i>English</i>
Technologies de communication	Communications technologies
Certaines normes sociales	Certain social standards
Crises humanitaires (conflits, catastrophes naturelles, changements climatiques)	Humanitarian crises (conflicts, natural disasters, climate change)

<i>French</i>	<i>English</i>
Pandémie VIH/SIDA	HIV/AIDS Pandemic
Vulnérabilité de certains enfants	Vulnerability of certain children
Demande croissante et criminalité organisée	Growing demand and organized crime
Pauvreté	Poverty
Vulnérabilité	Vulnerability
Familles et communautés	Families and communities
Vente	Sale
Exploitation des enfants	Exploitation of children

(a) Poverty exacerbated by the financial and food crises

39. Poverty remains the primary reason for the sale and sexual exploitation of children. It has been exacerbated by armed conflict, climate change (e.g. desertification, severe flooding), natural disasters and the HIV/AIDS pandemic. According to the 2010 MDG Global Monitoring Report published by the World Bank and the International Monetary Fund, the number of people living on less than US \$1.25 per day in developing regions fell from 1.8 billion in 1990 to 1.4 billion in 2005. Nevertheless, new World Bank estimates suggest that the crisis left 50 million more people in extreme poverty in 2009, a number which is expected to rise to 64 million by the end of 2010, mainly in sub-Saharan Africa and East and South-East Asia.

40. Poverty takes an especially heavy toll on children, as evidenced by the following figures cited by UNICEF:⁸

- 8.8 million children worldwide died before their fifth birthday in 2008;
- 4 million newborns worldwide are dying in the first month of life;
- over 500,000 women die each year from causes related to pregnancy and childbirth, leaving a large number of orphans;
- 148 million under-fives in developing regions are underweight for their age;
- 22 million infants are not protected from diseases by routine immunization;
- 1 billion children are deprived of one or more services essential to survival and development;
- 101 million children are not attending primary school, with more girls than boys missing out.

41. In the face of poverty, inaccessibility to basic social services and lack of opportunity, families find themselves unable to ensure the development and safety

⁸ UNICEF, *The State of the World's Children*, special edition in commemoration of the twentieth anniversary of the Convention on the Rights of the Child.

of their children. They adopt survival strategies that may endanger their children. Some parents emigrate in search of a better future, leaving their children behind, while some children emigrate on their own initiative or at their family's urging, and are handed over, for a fee, to exploiting individuals who push them into work. These children are more vulnerable to all forms of exploitation and abuse.

(b) Certain social standards

42. It is important to analyse the causal links between social standards and the sale and exploitation of children in order to better understand and address them. "Social standards" encompass the rules of conduct and models of behaviour defined by society.

43. These rules of conduct and models of behaviour are very often particular to a region or country, and reflect significant geographic diversity. They are based on psychological-social-cultural perceptions, which are shaped by the way people view a given issue, and then translated into words, attitudes and behaviours. An analysis of all the studies done on the sexual and/or economic exploitation of children highlights the impact of social standards on the existence and persistence of the problem.

Perception of childhood

44. The definition of a child, as it is set out in the Convention on the Rights of the Child, is not accepted by all. The concept of childhood is often confused with early childhood or even pre-adolescence. In practice, it is the community's attitude towards the physical, psychological and behavioural development of children that determines when a child becomes an adult. Social age is more important than real age: as soon as visible signs of pre-puberty appear, the child is no longer considered a child by society; he or she is expected to act like an adult and, more importantly, society evaluates his or her behaviour on that basis.

45. Therefore, a pubescent child who becomes a victim of sexual exploitation (especially a girl) is not necessarily seen as a victim, but rather as guilty of behaving or dressing provocatively or of a poor upbringing.

Allowing children to have a voice

46. In traditionally patriarchal societies, social stratification according to age does not grant children the status of fully fledged persons. Their opinions are neither respected nor taken into account by the family and the community. Children cannot challenge what adults say, or refuse to carry out their orders. The authority of parents and other adults is sovereign and does not recognize a child's right to express himself or herself, since such expression is considered a sign of poor upbringing and a lack of respect. Children are not considered as individuals; family and the community have primacy.

47. Children assimilate these values and therefore accept, more or less readily, the authority of parents and of older individuals outside the family; some children even appear to seek such authority figures.

Sex education: between tradition and modernity

48. Sexuality remains a taboo subject in many societies. Ignorance, apprehension and embarrassment contribute to parents' unwillingness to talk to their children about sex for fear of arousing their curiosity or encouraging sexual debauchery. The topic of sex is therefore discussed among youth, often of the same sex, between brothers and sisters, and sometimes with teachers (as part of sex education).

49. Increasingly accessible new technologies have exposed children to pornography and inspired and influenced young people's sexual practices. Pornography is becoming the main means of sex education and encouraging the spread of related practices and behaviours.⁹ Child pornography networks circulate photos of smiling children in order to trivialize sexual attraction to children and to convince children watching that they are having fun.

Gender discrimination

50. The past few decades have witnessed a growing recognition of the existence of gender-based violence. Such violence, which intensifies in times of conflict or crisis, is often the expression of the status society reserves for women and is also reflected in discrimination in access to all social services, particularly school.

Right to education

51. In many societies, the unequal social status of women continues to contribute to patent discrimination against girls, particularly in poor and rural communities. Girls born in poor households or living in rural communities are at a clear disadvantage in terms of education, owing to persistent attitudes and practices that encourage early marriages and the confinement of young women, and give greater importance to the education of boys over girls.

Early marriages

52. In 2007,¹⁰ more than one third of young women 20 to 24 years old (that is, over 64 million¹¹) in developing countries reported that they were married or in union by age 18. Early marriages are twice as common among young girls from poor families and those living in rural areas. Furthermore, these early marriages lead to early pregnancies (14 million young women give birth between the ages of 15 and 19 years old¹²), which endanger the health of the mothers and their children.

53. In some circumstances, early marriage is used as an economic survival strategy by poor families. Girls are given into marriage, often against their will and in exchange for a dowry, in order to settle the family's debts, to acquire land or even to settle disputes between families or clans.

54. Early or forced marriage, which is not considered a form of exploitation, makes young girls more vulnerable to mistreatment and exploitation. It often results

⁹ End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT) International, *Violence against children in cyberspace*, Bangkok, 2005, pp. 52-55 (http://www.eepat.net/E1/publications/ict/Cyberspace_ENG.pdf).

¹⁰ UNICEF, *Progress for Children*, 2009.

¹¹ UNICEF, *State of the World's Children*, 2009.

¹² Ibid.

in their leaving school early and prevents them from acquiring the skills that could make them more independent. When girls flee a marriage, they most often find themselves with no education or source of livelihood, separated from their family environment and, therefore, in a situation of great vulnerability in which one of the sole means of survival is prostitution.

Rape and sexual exploitation of girls and women during armed conflict

55. The rape and sexual exploitation of young girls and women have been used as veritable weapons of war during conflict. The physical and psychological consequences are significant for the victims, who often find themselves stigmatized and marginalized and hence more vulnerable.

Feminization of the AIDS pandemic

56. Throughout the world, the epidemiological situation shows an increase in cases of AIDS among the heterosexual population, the percentage being three to eight times higher among women and girls than among men. The greater vulnerability of women to AIDS is due to physiological and biological factors, but also to social, cultural and economic pressures that do not allow them to protect themselves.

Sexual exploitation of boys

57. It must not be forgotten that boys are also victims of abuse and sexual exploitation. Poverty, lack of opportunities and the development of sex tourism are the main causes. Where the latter is concerned, some foreign predators, both men and women, are interested solely in sexual relations with boys. There is still a strong taboo surrounding the subject of prostitution of boys, especially where homosexual relations are concerned. In some countries where homosexuality is an offence, a sexually exploited boy under 18 may be punished by law for homosexual relations.

Violence perceived as part of children's upbringing

58. The full extent of violence against children is unknowable, because it most often takes place secretly within the families and no complaint is made. According to the Secretary-General's Study on Violence against Children and to data from the UNICEF Innocenti Research Centre (2006), between 500 million and 1.5 billion children¹³ are subjected to violence every year. Often, children who are exposed to violence or are witnesses of acts of violence say nothing for fear of reprisals or exclusion, and many of them accept violence as being part of their lives. Thus, these acts of violence are not always experienced or perceived as such by all. Children respond to them with silence and submission. As a result, violence has a tendency to become normalized.

59. In this context, relationships of force and domination, including those of a sexual nature, may be experienced as "normal" by all parties involved.

¹³ UNICEF, *Progress for Children*, 2009.

Recourse to amicable settlement

60. In some regions, particularly rural ones, complaints remain rare. Very few children and families of victims file a complaint, because of ignorance of the law, the financial and geographical difficulties of access to the police and justice services, fear of reprisals, fear of being stigmatized and lack of confidence in judicial procedures.

61. Accordingly, most cases are settled amicably, between the victim's family and the perpetrator, without taking into account the views of the victim. The perpetrators thus get away with making amends in cash or in kind, or by marrying the victim (reparatory marriage).

Summary

62. The influence of certain social norms on the existence and persistence of these phenomena poses, on the one hand, the problem of reconciling social norms, national legislation and international standards, and on the other, that of the failure to apply endogenous protection practices that exist within communities.

(c) The HIV/AIDS pandemic and sexual exploitation of children: a vicious circle

HIV/AIDS makes children more vulnerable to sexual exploitation

63. The number of children in the world¹⁴ aged under 15 is estimated at 2 million, and the number who have lost one or both parents to AIDS at 15 million, of whom the vast majority live in sub-Saharan Africa. A forward-looking study¹⁵ conducted by UNICEF estimates that in 2010, HIV/AIDS will have caused 20 million African children aged under 15 to lose one or both parents.

64. Among the children made vulnerable by the HIV/AIDS epidemic are: children who have lost one or both parents; children who have a sick parent; children who are living in poor households with responsibility for orphans; and children who are themselves seropositive. These children experience severe psychological distress intensified by social stigmatization and discrimination in access to schooling and to care, and are more vulnerable to sale and/or trafficking and to sexual exploitation.

Sexual exploitation of children makes them more vulnerable to HIV/AIDS

65. Child victims of sexual exploitation¹⁶ do not see prevention of HIV/AIDS as a priority because:

- They are ready to do anything to survive;
- They are uninformed or poorly informed about the mode of transmission of HIV/AIDS and the means of prevention;
- They lack ready access to condoms;
- They are unable to negotiate on their own: the adults respond with coercion, the prospect of more money, or false information;

¹⁴ UNICEF, *The State of the World's Children*, 2009.

¹⁵ UNICEF, *Africa's orphaned generation*, 2003.

¹⁶ ECPAT International, "Confronting the Commercial Sexual Exploitation of Children in Africa", 2007.

- Having a regular clientele gives them reassurance.

66. Moreover, the HIV/AIDS epidemic has led adults to seek sexual relations with increasingly young children, as they have more chance of being healthy.

67. Sex tourism is changing its destinations, choosing countries with a low prevalence rate and thus leading to an increase in the sale and/or trafficking of children for sexual purposes, child prostitution and child pornography in the preferred regions.

(d) Conflict and humanitarian crises

68. According to estimates by UNICEF,¹⁷ slightly more than 1 billion children live in States or territories affected by armed conflict. Nearly 300 million of them are under 5 years of age. In 2006, there were an estimated 18.1 million child refugees and internally displaced persons.

69. Conflicts affect the safety and well-being of the most vulnerable populations, particularly children as they negatively impact on living conditions by exacerbating economic crises, destroy infrastructure and cause massive displacements of people both internally and beyond national borders outside the country. The lack of a family environment, the destruction of social safety-nets, instability and a culture of impunity mean that children are more likely to be subjected to forced labour, sale and trafficking, recruitment into armed forces and armed groups, early marriage or sexual exploitation.

70. Natural disasters, including earthquakes, droughts, floods and tidal waves, cause major population movements, destroy infrastructure and worsen people's living conditions. Women and children are particularly affected. Children who are separated from their families as well as accompanied children, especially in households that are themselves headed by children, no longer possess any official documents and are inevitably at greater risk of economic and sexual exploitation as well as of being sold for illegal adoption.

(e) Ease of access to new technologies

71. In both developed and developing countries, children have easy access to new technologies (at home or at school, in clubs and at Internet cafes).

72. The exponential growth of technology and means of communication, constantly changing patterns of production and consumption, social networks, video sharing, instant messaging and the increasing interactivity of online content offer new opportunities for users but, at the same time, pose new risks for children and young persons. Technological convergence between mobile phones and the Internet has had a major impact on online security. Children are now able to log on to pornographic sites and chat online with sexual predators, and, in this way, may fall victim to sexual exploitation.

(f) Increasing demand and organized crime

73. There is a veritable lucrative market based, on one hand, on the demand for cheap labour, sexual services and children for adoption, and on the other hand on

¹⁷ UNICEF: *Progress for Children*, 2009.

clandestine transnational criminal organizations. Such organizations continue to grow despite the high number of criminal networks which have been dismantled. Thus, networks regulate global supply and demand in what is estimated to be a very lucrative multi-billion dollar market.

74. In many countries, there are infamous preferred locations where children are sold, trafficked and sexually exploited. Sexual predators, those who exploit children and well-structured criminal networks take advantage of child and family vulnerability, facilitated access to children through tourism, the Internet or telecommunications, porous inter-State borders, corruption and loopholes in legislation on protecting children and punishing offenders in accordance with ratified treaties, and on combating corruption.

(g) Increasing vulnerability of families and communities

75. Some families and communities find it increasingly difficult to care for their children. This leads to the breakdown of transgenerational protection mechanisms.

76. Domestic violence, the absence of one or both parents and poverty mean that it is no longer the case that families always constitute a reference point and safe haven for children.

77. Thus children are either left to fend for themselves; entrusted or handed over to third parties; or incorporated into the survival mechanisms of their families, often working from a very early age in order to meet their own needs and the needs of their families. They may even migrate to other cities or countries (with or without the consent of their families).

(h) Vulnerability of certain children

78. Because they are still growing and are dependent on adults, children are vulnerable by nature. They must be trained, brought up, educated, supervised, guided and moulded by their families, guardians and all others who exercise authority over them. However, certain children are more vulnerable than others.

Children not registered at birth

79. Birth registration provides an official record of a child's existence and nationality and is considered a fundamental right under article 7 of the Convention on the Rights of the Child. Birth registration should be free and universal.

80. Nonetheless, the births of nearly 51 million children were not registered in 2007.¹⁸ Children from the poorest households are twice as likely to be unregistered at birth as children from the richest households.

81. Unregistered children have no access to services to which they are entitled, including protection, health care and education. Registering a child's birth is a vital step towards his or her protection. As an official document specifying a child's age, a birth record allows appropriate legal steps to be taken with a view to ensuring that child's protection and penalising offenders in confirmed cases of exploitation or sexual exploitation. Children who possess a birth record are less likely to be sold

¹⁸ Ibid.

than those who do not. In addition, a birth record is an acknowledgement of parentage that can often guard against illegal adoption.

Street children

82. Although their exact numbers are impossible to quantify, it is believed that there are tens of millions of street children. Some estimates put the figure as high as 100 million.¹⁹ It is, moreover, likely that the number of street children will increase in tandem with global population growth and that urbanization will increase at the same pace.

83. The fact is that, to some extent, street children are present in all the world's cities, including the largest and richest cities in the industrialized world.

84. Most street children are not orphans. Many remain in contact with their families and work on the street to augment household income. Others have fled to escape psychological, physical or sexual abuse.

85. Once on the street, children are vulnerable to all forms of exploitation and abuse. Girls who belong to gangs are subject to violence and sexual exploitation by male gang members.

86. In Islamic societies in West and Central Africa, parents entrust their children into the care of a Marabout (religious teacher) so that they may obtain a religious education. This education system is abused and results in the exploitation of children with some Koranic teachers sending children to beg on the streets of big cities where they must collect a certain sum of money each day and provide their own meals.

87. While it may be less obvious, this phenomenon also results in children being sold or trafficked. Talibé boys (religious students) as well as children from rural areas or neighbouring countries are found on the streets of certain major cities.²⁰ These children, who live on the street and must fend for themselves in very difficult conditions, often fall victim to abuse and sexual exploitation.

Child labourers

88. Despite efforts to combat child labour, UNICEF estimates that 150 million children 5-14 years old worldwide are engaged in child labour.²¹ According to ILO estimates, more than two thirds of all child labour is in the agricultural sector. Children in rural areas — and girls in particular — begin agricultural labour as young as 5-7 years old.²²

89. Domestic labour is one of the most common forms of labour primarily affecting girls. Thousands of out-of-school young girls from disadvantaged backgrounds are placed in household service to supplement family income. These girl domestic workers are often subjected to violence and sexual abuse by employers. Because of their precarious economic situation and fearful of being sent back, these young girls feel obliged to submit to their employers' advances. Those

¹⁹ UNICEF: *State of the World's Children, 2006*: Excluded and Invisible.

²⁰ UNICEF Innocenti Research Centre: "Trafficking in Human Beings, especially women and children, in Africa", 2005.

²¹ UNICEF: *Progress for Children, 2009*.

²² International Labour Organization, "The end of child labour: Within reach", 2006.

who flee oppression most often end up in the street and get caught up in the spiral of prostitution.

Migrant children

90. According to the World Bank, approximately one third of migrants from developing countries are young persons between the ages of 12 and 24.²³

91. Such migration, both internal and external, can occur in response to individual imperatives (such as the search for economic or professional opportunities), or to family and communal imperatives in connection with survival strategies or efforts to find suitable social or educational environments for children. Permanent and seasonal migrations, whether cross-border or within a country, are dictated by poverty, deteriorating living conditions, chronic drought, armed conflict and/or political instability.

92. At all stages of migration (origin, transit, destination), migrant children are extremely vulnerable²⁴ to sale, trafficking and sexual exploitation. Host communities often discriminate against and marginalize migrant children, especially those who are not registered, in particular, by denying them access to education and medical services. Because of their irregular status and their fear of being caught and deported, they are forced to adopt survival strategies, becoming more vulnerable to sexual exploitation and forced labour.

Child victims of trafficking

93. According to some estimates,²⁵ there could be as many as 1.2 million child victims of trafficking per year. This profitable and well-organized criminal activity (which involves trafficking routes, networks, recruitment via the Internet, fictitious labour contracts, "mail-order brides" and corruption) is fuelled by the demand for children for low-cost labour, sexual exploitation or illegal adoption.

Addictive behaviours among adolescents

94. Around the world, adolescent substance abuse is a growing and alarming phenomenon. The rising — and disturbing — number of adolescents addicted to all types of drugs (including solvents, psychotropic substances, cannabis, heroin, cocaine, crack, Methylenedioxymethamphetamine (MDMA or ecstasy)) and/or to alcohol, forces a large number of them to turn to prostitution to obtain the money to supply their habits.

95. Sexually exploited children and adolescents are often trapped in their situation by drugs. Drugs are used to lure children into the world of the sex industry, and addiction ensures that they will remain there. Dosages are increased to ensure addiction and keep them compliant and incapable of escaping.

96. The risk of HIV infection is very high for these addicted adolescents because of their high-risk sexual behaviour and the sexual exploitation to which they are subjected.

²³ World Bank, "World Development Report 2007".

²⁴ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, 2009.

²⁵ UNICEF, *The State of the World's Children 2010*.

Children with disabilities

97. It is difficult to obtain reliable statistics on children with disabilities. A recent World Bank study in nine countries showed that children with disabilities are less likely than other children to enrol and remain in school.²⁶ Access to health services is also problematic, either because such services are not available or because children are discriminated against and excluded. Their disabilities can make them all the more vulnerable to violence, abuse and sexual exploitation.

Children of minorities

98. Children of minorities have less access to basic social services and protections, and are more vulnerable to sale, trafficking and sexual exploitation.

Institutionalized children

99. UNICEF estimates that over 2 million²⁷ children around the world are in institutional care, but that is probably a gross underestimate because of the lack of reliable reports and data.

100. Poverty and lack of a family environment are often the cause of institutionalization.

101. In some countries, children under 18 involved in prostitution or pornography cases are considered delinquent and are put in detention centres, detention being regarded as an appropriate way of protecting child victims of sexual exploitation.

102. Many institutions are not registered, and many countries do not have rules and standards to regulate them and do not keep data on institutionalized children. A large number of institutions are handicapped by a lack of qualified human resources and material resources. Supervision and control of such institutions is often haphazard, and with no avenues of recourse, institutionalized children are all the more vulnerable to violence, abuse and sexual exploitation.

Summary

103. Sale and sexual exploitation of children are fuelled by a number of interdependent factors stemming not only from the local or national context in which the child lives and was raised (political, legislative, cultural, environmental, socio-economic and institutional) but also from the global context (tourism, communications technology, the financial crisis, the food crisis and climate change). This multifaceted and complex dimension necessitates an integrated approach with a view to putting in place, with the effective participation of children, genuinely local and national child protection systems that is to say, the coordinated establishment (with community involvement) of a set of social norms, laws, policies and services to guarantee the protection of child victims and children at risk.

²⁶ World Bank: *Disability, Poverty and Schooling in Developing Countries*, 2005.

²⁷ UNICEF, *Progress for children*, 2009.

C. Activities

104. Numerous national, regional and international efforts to prevent and combat these phenomena have unquestionably achieved some successes in providing protection for children. These include ratifications of conventions and protocols, legislative reforms, action plans, awareness activities and campaigns, the participation of children, child assistance and protection services, dismantling of criminal networks, involvement of the private sector within the context of corporate social responsibility, and regional and international cooperation efforts.

105. Nevertheless, huge disparities persist and many challenges remain with regard to implementation of the recommendations of the various United Nations mechanisms and the Rio de Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents.²⁸

1. Ratification of relevant regional and international instruments

106. Without a doubt, there has been a steady increase in the number of ratifications of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. To date, 137 States parties have ratified the Optional Protocol. However, when it comes to the goal of ratification of all relevant regional and international instruments by 2013,²⁹ it should be pointed out that the Optional Protocol has yet to be signed or ratified by 29 countries.

2. Effective implementation of laws guaranteeing the protection of children

107. Numerous legislative reforms have been undertaken. However, despite these efforts, legal gaps persist in many countries. Some national legislation does not clearly define the concept of the sale of children or the legal age of marriage, criminalize all forms of sexual exploitation of children (taking into account the age of sexual consent), provide for free forensic assistance for children and protection and compensation for child victims, and/or establish extraterritorial jurisdiction with respect to all crimes involving the sexual exploitation of children.

108. Law enforcement disparities persist not only between countries but within countries. Access without discrimination to police protection and the justice system, as well as confidentiality, cannot always be ensured owing to lack of material and qualified human resources. Impunity and corruption are rampant. People are not sufficiently familiar with the rights of children and legislation protecting them. Reporting remains inadequate because of taboos, fear of retaliation and stigmatization, and out-of-court settlement.

109. With respect to the establishment by 2013³⁰ of an effective and accessible system for reporting, follow up and support for child victims of suspected or actual incidents of sexual exploitation, many countries do not yet have such a system.

²⁸ Third World Congress against Sexual Exploitation of Children and Adolescents (Rio de Janeiro, November 2008).

²⁹ Rio Declaration and Call for Action, 2008.

³⁰ Ibid.

3. **Implementation of integrated and intrasectoral strategies for prevention and for the protection, reintegration and follow-up of children**

110. While a large number of action plans and strategies have been developed, they are very often only partially or incompletely implemented in some countries owing to:

- Weak capacities of the institutions responsible for the design, implementation and monitoring of action plans and strategies;
- Inadequate human resources in terms of both quantity and quality;
- Inadequate budget allocations, for which they often rely on development partners to some extent;
- Multiple sectoral action plans, leading to duplication, and lack of rational and optimal use of resources;
- Low level or absence of consultation and synergy among various actors and departments;
- Shortage or absence of centralized information systems and monitoring and assessment mechanisms through which to measure changes in the situation of children and the impact of actions undertaken.

111. With respect to the delivery of medical, psychological and social care and the reintegration and follow-up of child victims, many services have been put in place, but in some countries these activities are geographically limited and the capacity to provide care and follow-up to children and support to families remains inadequate. Moreover, a large number of children's shelters are not governed by the standards and norms of child protection and are not subject to regular monitoring.

112. With respect to prevention, numerous awareness-raising campaigns have been conducted and information tools have been developed. However, awareness-raising often remains sporadic, messages are not always geared towards the target audience and their impact is not measured.

113. Much remains to be done in the areas of protection of children at risk, access without discrimination by children and vulnerable groups to basic infrastructure and basic social and economic services, the strengthening of community protection mechanisms and the promotion of protective social norms.

4. **Participation of children**

114. Although the participation of children has gained increased visibility, progress must still be made on:

- Children's access to information and freedom of expression and association;
- Taking the opinions of child victims into account;
- Representation of children without discrimination of any kind in such bodies as parliaments, councils and committees on children;
- Use of the participatory approach by all agencies and individuals who work with children.

115. Children's participation should be made systematic throughout the process of developing, implementing and monitoring child protection strategies, for children are not only victims, they are also part of the solution.

5. Corporate social responsibility

116. With respect to corporate social responsibility, a large number of businesses have adopted codes of conduct or have launched or supported information and awareness programmes. Some States have adopted legislation on the accountability of Internet access providers, telecommunications companies and banks.

117. It would be useful to encourage and expand these initiatives, which would make it possible to incorporate child protection into the social responsibility policies of tourism, travel, transportation, agriculture, financial services, communications, media, Internet services, advertising and entertainment and other businesses.

6. Enhancing international cooperation

118. Numerous transnational actions are being undertaken, including cooperation among police forces to facilitate the exchange of information and expertise and the provision of technical and financial support to developing countries. These mechanisms and/or processes that facilitate coordination at the national, regional and international levels should be enhanced and expanded, particularly given that, owing to the development of information technologies, trafficking networks, tourism and migration, the sale and sexual exploitation of children transcend national boundaries.

7. Monitoring and assessment

119. Concerning the establishment by 2013 of mechanisms for the promotion and protection of the rights of the child, taking into account general comment No. 2 of the Committee on the Rights of the Child, some countries have mechanisms in place, but many others still do not have such mechanisms. These mechanisms should be enhanced where they already exist and should be put in place where necessary. Their role is to ensure the protection of children, the restitution of their rights, independent monitoring of the strategies and policies being implemented and advocacy for the strengthening of legal frameworks and, where necessary, to ensure that child victims have appropriate legal remedies, including the possibility of filing complaints.

Summary

120. States have taken some measures to implement the Optional Protocol. There has been a substantial increase in the number of initiatives taken at the international, regional and national levels by the private and public sectors, non-governmental organizations and agencies, often in cooperation, to prevent and combat the sale and sexual exploitation of children. Nevertheless, many challenges remain with respect to gauging the full scope of these offences, preventing them and providing effective protection to children.

D. Recommendations

1. Re-evaluation of approaches adopted

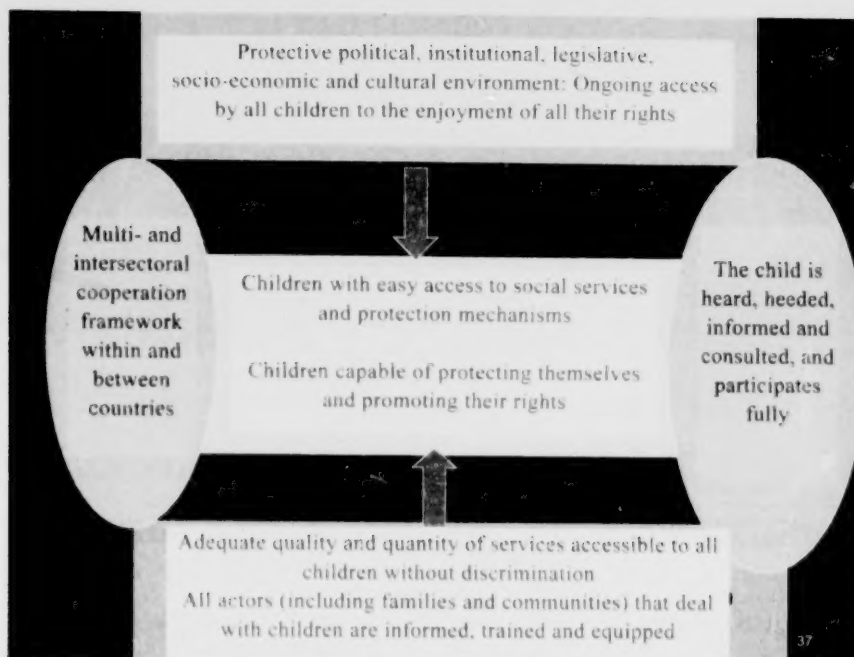
121. In order to remedy the inadequacies observed and to guarantee the effective and efficient protection of all children who are victims or at risk of sale and/or sexual exploitation, new approaches must be adopted that are informed by objective realities and the complexity of these phenomena.

122. To that end, there must be a shift away from the juxtaposition of sectoral actions towards the adoption of a child protection strategy aimed at establishing protection systems and based on:

- The guiding principles of the Convention on the Rights of the Child: the best interests of the child; the child's right to survival, life and development; non-discrimination; and the participation of the child;
- A child rights approach in which children have rights and all other actors who deal with children have obligations (the principle of accountability);
- A cross-cutting, integrated and coordinated approach as the basis for a genuine chain of protection in which interrelated and complementary actions are undertaken by a series of actors at the local, national and transnational levels;
- Taking into account the views and opinions of children, who are stakeholders in the solutions being sought for the protection and promotion of their rights.

123. This approach will make it possible to:

- better understand and grasp the multidimensional nature of these phenomena and the vulnerabilities of certain groups of children;
- develop and implement sustainable and context-specific strategies for the prevention of the sale and sexual exploitation of children and for the protection of children;
- decentralize these strategies by establishing local services that are easily accessible to all children and guarantee them ongoing access to the enjoyment of all their rights.

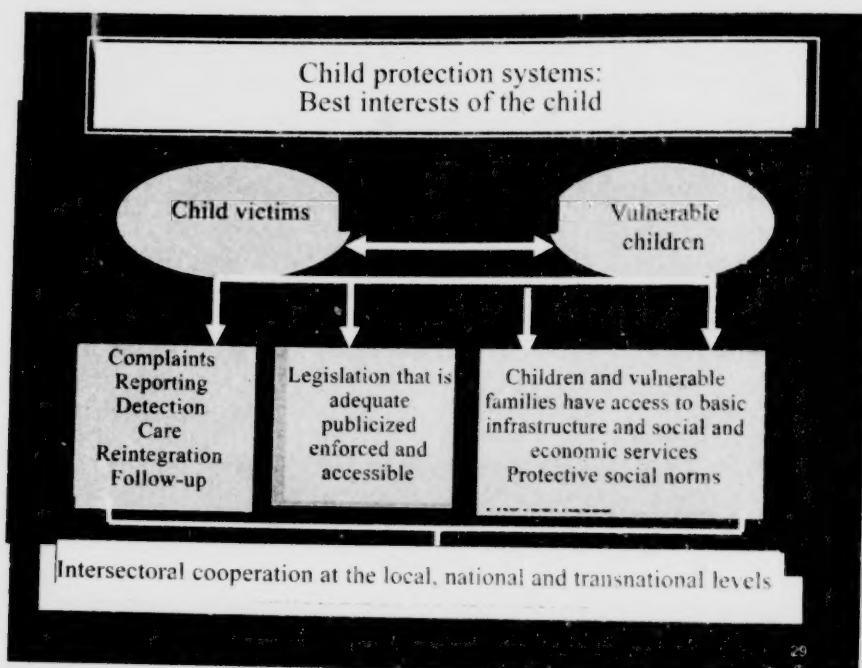


124. The implementation of protection systems is first and foremost a process that is based on:

- Full acceptance by all actors of the child-rights-based programming approach and the principles involved;
- Concerted and effective national, regional and international cooperation, in view of the multi- and intersectoral dimensions, both national and international, of the sale of children, child prostitution and child pornography.

2. Effective implementation and monitoring of recommendations

125. Establishing protection systems that safeguard the best interests of the child and cover (i) prevention; (ii) detection, and the care and medical, psychological, social and legal follow-up of the child; and (iii) the promotion of the rights of the child will help to ensure the implementation and monitoring of the recommendations of the Committee on the Rights of the Child, special procedures and the Rio de Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents.



126. The implementation of such systems relies on the following:

- Ratification of the second Optional Protocol and other relevant international and regional instruments by those countries that have not yet done so;
- A protective legislative framework: legislation that is harmonized with the ratified instruments and that guarantees the protection of children and criminalizes these offences; legislation that is publicized and enforced; police and legal services that are accessible without discrimination and that guarantee protection and confidentiality; and properly trained judges and police officers;
- A protective institutional framework: accessible detection and reporting mechanisms and mechanisms for the support and follow-up of children; social services that are accessible to children and families; services for the care, reintegration and follow-up of child victims that meet the standards and norms; proper training for agencies and individuals that deal with children; and efficient inter- and intrasectoral coordination mechanisms;
- A protective socio-economic framework: access to basic infrastructure, social services and economic support for vulnerable families and communities; adequate care and follow-up of vulnerable children; and the inclusion of child protection in local development policies;
- A protective sociocultural framework: promotion of protective social norms; identification and enhancement of endogenous community mechanisms for protection; informing and mobilizing children, families and communities for child protection;

- A reliable standardized information system: adoption of a rigorous method to gather and process disaggregated data; and intersectoral and transnational exchange of information;
- A mechanism for the promotion and protection of the rights of the child, taking into account general comment No. 2 of the Committee on the Rights of the Child: monitoring of changes in the situation of child rights; and monitoring of actions undertaken and evaluation of their impact;
- Corporate social responsibility that is enhanced and extended to various sectors (tourism, travel, transportation, agriculture, financial services, media, Internet and telecommunications): adoption of a code of conduct; support for action on prevention and protection through public-private partnerships;
- Systematic participation by children: access to information and means of expression for all children without discrimination; empowerment (capacity-building) of children; representation of vulnerable children in children's forums; actors and children properly trained in the participatory approach; and participation throughout the process of developing, implementing and monitoring child protection strategies;
- An international cooperation framework governing effective and coordinated mobilization of all stakeholders; exchange of information and expertise between police forces and justice systems; development and sharing of practices; harmonization of practices and tools; and ongoing technical and financial support for protection programmes.



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**Promotion and protection of human rights: human rights
situations and reports of special rapporteurs and representatives**

Human rights of migrants

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante, in accordance with General Assembly resolution 64/166 and Human Rights Council resolution 8/10.

* A/65/150.

Report of the Special Rapporteur on the human rights of migrants

Summary

The present report, on activities carried out between June 2009 and July 2010, is submitted pursuant to General Assembly resolution 64/166 and Human Rights Council resolution 8/10.

The report summarizes the activities undertaken by the Special Rapporteur on the human rights of migrants during the period under review and focuses on the impact of the criminalization of migration on the protection and enjoyment of human rights. The report highlights the detrimental consequences of such policies on groups that should not be considered aprioristically as irregular migrants, including victims of human trafficking, asylum-seekers and children. The report also provides examples of good practices in the mainstreaming a rights-based approach to migration and managing irregular migration without resorting to its criminalization. The report concludes with recommendations for further consideration and action by Member States and other stakeholders.

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I. Introduction

1. The present report is being submitted to the General Assembly by the Special Rapporteur on the human rights of migrants, Jorge Bustamante, pursuant to Assembly resolution 64/166 and Human Rights Council resolution 8/10. The Special Rapporteur reports on his activities in fulfilment of his mandate between June 2009 and July 2010. He also highlights issues related to the impact of the criminalization of migration on the protection and enjoyment of human rights, presents an illustrative number of good practices and promising policies and makes recommendations to Member States and other stakeholders.

II. Activities of the Special Rapporteur

2. The Special Rapporteur carries out his activities in accordance with Human Rights Council resolution 8/10. Further thematic guidance for the activities of his office is provided by Human Rights Council resolutions 9/5 and S-10/1 and General Assembly resolutions 62/156, 63/184 and 64/166.

3. During the reporting period, the Special Rapporteur participated in the sixteenth and seventeenth annual meetings of special procedures mandate holders of the Human Rights Council, held from 29 June to 3 July 2009 and from 28 June to 2 July 2010. He also participated as a keynote speaker at the following meetings: the first meeting of the Permanent Forum of Arab-African Dialogue on Democracy and Human Rights, held at the headquarters of the League of Arab States in Cairo from 7 to 9 December 2009; the expert consultation on the right to education of international migrants, refugees and asylum-seekers convened by the Special Rapporteur on the right to education with the support of the Open Society Institute, in January 2010; and the Global Consultation on Migrant Health organized by the International Organization for Migration (IOM) and the World Health Organization (WHO) in Madrid from 3 to 5 March 2010. He also attended several events organized by civil society organizations and met on several occasions with civil society representatives to discuss specific issues related to his mandate.

4. The Special Rapporteur continued to receive information about the situation of migrants worldwide and to exchange communications with Governments. A summary of the communications sent from March 2009 through March 2010, together with replies from Governments, was included as an addendum to the 2010 annual report presented at the fourteenth session of the Human Rights Council (A/HRC/14/30/Add.1).

5. During the period under review, the Special Rapporteur visited Senegal (17 to 21 August 2009) and Japan (23 to 31 March 2010). The Special Rapporteur also plans to visit South Africa in 2010, at the invitation of the Government. The reports of his country visits will be presented at a forthcoming session of the Human Rights Council in 2011.

6. The Special Rapporteur presented his thematic report to the Human Rights Council on the rights to health and adequate housing in the context of migration (A/HRC/14/30). He recalled the universality and indivisibility of human rights, and stressed that States must take immediate and concrete steps to ensure the realization of the human rights of migrants at all stages of migratory processes in countries of origin, transit and destination. He also made a series of recommendations for further

consideration and action by States and other stakeholders and wishes to encourage States to address those recommendations.

III. Issue in focus: the impact of the criminalization of migration on the protection and enjoyment of human rights

7. In 2008, the Special Rapporteur warned the Human Rights Council of the increasing criminalization of irregular migration and the abuses of migrants during all phases of the migration process. He also referred to the externalization of migration control policies, the criminalization of labour migration, violations against irregular migrants pertaining to interception and rescue at sea, detention and expulsion, and smuggling and trafficking.¹

8. In the present report, which is being submitted two years later, the Special Rapporteur observes with deep concern that the trend towards increasing criminalization continues. In addition, insufficient progress has been made in mainstreaming human rights into migration governance. Yet, migration can be an essential component of development and prosperity in countries of destination, transit and origin in all regions of the world, and migrant labour continues to be vital, and in demand, in most countries around the globe.

9. The Special Rapporteur observes that disregard for human rights in migration management initiatives has detrimental consequences not only for the protection of non-documented or irregular migrants, but also for migrant populations as a whole and host societies at large. Accordingly, he proposes, in this report, to expand the framework of analysis to include the overall impact and consequences entailed by policies that use criminal penalties, or administrative penalties which mimic criminal ones, including policies that encourage labelling migrants as criminals or illegal.

10. While recognizing the complexity of irregular migration and the plight of irregular migrants, smuggled migrants and victims of abusive forms of migration and transnational organized crime, the Special Rapporteur wishes to stress that he does not aim to encourage irregular migration, but rather to underscore that irregular migration is sometimes tacitly encouraged by the migration management policies put in place by States. He also aims to highlight that a simplistic crime prevention or law enforcement approach is ineffective and usually neglects the human rights concerns involved in the complex causes and effects of irregular migration, in particular the importance of States adhering to international human rights standards vis-à-vis all migrants, whether documented or not.

11. In line with the above, the Special Rapporteur wishes to draw the General Assembly's attention to major human rights implications of the criminalization of irregular migration. The Special Rapporteur expects that his report will contribute to the dialogue on these issues in the framework of the fourth meeting of the Global Forum on Migration and Development, which will be held in Mexico in November 2010. In his view, the Forum's central theme "Partnerships for migration and development: shared prosperity-shared responsibility" is momentous. It provides an important platform for dialogue among States and other stakeholders on migration

¹ See A/HRC/7/12.

management and the protection of the human rights of migrants as the *sine qua non* for harnessing the benefits of migration and making of it a choice and a crucial tool for sustainable development.

12. The present section is divided in three major sub-themes: (a) the impact of the criminalization of migration on the enjoyment of human rights; (b) the impact of the criminalization of migration on specific groups; (c) examples of good practices and alternatives to the criminalization of irregular migration. The report concludes with a number of recommendations aimed to ensure that States adopt successfully a rights-based approach to migration, which includes rights-based alternatives to the criminalization of migration.

13. The Special Rapporteur expresses his gratitude for the cooperation and valuable inputs provided by many stakeholders during the course of his mandate.

A. The impact of the criminalization of migration on the enjoyment of human rights

14. The Special Rapporteur observes that migration policies, plans and programmes that aim to address solely security and border control concerns lack human and protection approaches, impact detrimentally on the enjoyment of human rights by migrants and do not serve the purpose of deterring irregular immigration and discouraging migrants' smuggling and human trafficking.

15. The Special Rapporteur wishes to draw the attention of the General Assembly to the dangers of these policies, not only for migrants, but also for the migrants' societies of transit and destination. Research studies have already demonstrated that many enforcement mechanisms designed to prevent irregular or unauthorized migration, including harsh policies of interception, carrier sanctions and immigration control activities, may themselves be responsible for violence and abuse and may have the side effect of encouraging the expansion of smuggling and trafficking networks.²

16. In the Special Rapporteur's view, criminalizing irregular migrants for the offence of being in a country without adequate documentation makes all migrants, regardless of immigration status, vulnerable to potential racist or xenophobic acts. Societies quickly distort the particular situations of migrants, and associate them with criminality, including organized crime, drug trafficking, robbery or even terrorism. As a result, migrants are prone to xenophobic outbreaks of abuse and violence, as evidenced by some of the alleged human rights violations brought to the attention of the Special Rapporteur over the past two years.³

17. This detrimental pattern of individual and group behaviour in some transit and destination societies has a negative impact on children's upbringing since xenophobic models are handed down to them by adults and discriminatory sectors of society. In that connection, the Special Rapporteur wishes to warn the General Assembly of the consequences of the criminalization of migration on the enjoyment

² See *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, International Council on Human Rights Policy, Geneva, 2010; Andrew Brower and Judith Kumin, "Interception and Asylum: Where Migration Control and Human Rights Collide", *Refuge*, vol. 21, No. 4, December 2003.

³ See A/HRC/14/30/Add.1 and A/HRC/11/7/Add.1.

of human rights by migrants and to draw attention to the disproportionate use of the criminal justice system to manage irregular migration and of detention in migration management, as well as the inappropriateness of labelling migrants as “criminals” or “illegal”, which, in turn exerts influence on the use of profiling⁴ against migrants.

1. The disproportionate use of the criminal system of justice to manage irregular migration

18. Breaches of immigration law are considered as criminal offences by a number of countries. Such breaches include: situations of irregular entry; lack of residence authorization; overstay using an expired residence authorization or tourist visa; and unauthorized re-entry after a deportation and re-entry prohibition decision. Some countries also criminalize third party assistance to irregular or non-documented migrants, or oblige third parties to report migrants (or suspected) migrants in irregular situations, a measure that is increasingly being used to discourage migration in general and to deter irregular immigration in particular.⁵

19. Migration management based on criminal law tends to disregard a human rights dimension of migration and to focus solely on measures to address irregular migration by strengthening border controls and criminalizing both the facilitators and the migrants themselves. The Special Rapporteur has shown in the course of his mandate that the use of criminal measures to manage migration undermines the human rights of migrants and can directly or indirectly curtail their access to basic social rights, particularly health care, education and housing, as outlined in his annual thematic report to the Human Rights Council.⁶ In some instances, these measures also trigger multiple forms of discrimination and, in extreme cases, they have also endangered or violated the right to life.

20. In line with the above, the Special Rapporteur wishes to stress that the use of criminal law in the field of migration seldom serves the purpose of making migration safer, more secure or protected. As highlighted recently by the Commissioner for Human Rights of the Council of Europe, “criminal law is designed to punish individuals who harm other individuals or the society at large” and crimes of border crossing or stays on the territory of a State beyond a permitted period “are victimless crimes” and do not pose any harm to the society at large, but, if at all, “to the integrity of the State’s border and immigration control laws”.⁷

21. The root causes of irregular migration are not addressed by resorting to its criminalization. Irregular migration is a complex phenomenon with multiple and interrelated causes, closely linked to three major triggers: the existence of increasingly restrictive controls in some countries of destination, as well as

⁴ “Migrant profiling” is defined in the present report as the use of generalizations grounded in immigration status or, in the most common patterns of ethnicity, race, national origin or religious affiliations of migrants as the basis for making law enforcement and/or investigative decisions about who has been or may be involved in criminal activity. Profiling is accepted as a policing tool as long as the profiles used by police are based on specific information about an individual or factors that are objective and statistically proven to be significant indicators of criminal activity. See: *Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory*, Open Society Justice Initiative, New York, 2009.

⁵ A/HRC/7/12.

⁶ A/HRC/14/30.

⁷ *Criminalisation of Migration in Europe: Human Rights Implications*, Commissioner for Human Rights, Issue Paper, 2010.

restrictions on legal avenues for migration (including family reunification); a rise in unemployment and social exclusion in some countries of origin, along with increased structural disparities within and among countries; and pull factors in destination countries, particularly the increased demand in the informal sectors of the labour market, which is endogenous to countries of destination.

22. The Special Rapporteur holds the view that irregular migration is the result of the interaction of factors in countries of origin and destination and that therefore, managing irregular migration is a shared responsibility as pointed out in the theme of the fourth meeting of the Global Forum on Migration and Development.⁸ In his view, recognizing the demand for the labour force of irregular migrants in countries of destination should be the basis for the moral and legal obligation of countries of destination and origin to share responsibility for shaping and implementing a human rights-based approach to migration governance and subsequent decriminalization of irregular migration.

2. The disproportionate use of detention in migration management

23. The Special Rapporteur deeply regrets that in many countries, immigration procedures routinely include detention as the main, or even the only, interim measure to ensure the efficacy of migration control. Detention is also used as a deterrent measure to prevent further arrivals of migrants and asylum-seekers. In his view, these objectives cannot justify the widespread and increasing use of immigration detention. The Special Rapporteur is of the view that States should, on the contrary, progressively abolish it.⁹

24. The Special Rapporteur is also concerned that in some instances immigration detention mimics criminal detention and is applied without any judicial oversight, thus operating in clear contradiction to international law and human rights standards. He remains concerned about arbitrary migration-related detention laws and practices, the general absence of implementation of judicial and due process of law guarantees, and regrets that in some instances the maximum length of immigration detention is undetermined.

25. The Special Rapporteur concurs with the Working Group on Arbitrary Detention, which has stated that the principle of proportionality requires that administrative detention should be considered as a measure of last resort. Strict legal limitations must be observed and judicial safeguards provided for. The reasons put forward by States to justify detention, such as the necessity of identifying migrants in irregular situations, the risk of migrants absconding or facilitating the expulsion of irregular migrants who have been served with removal orders must be clearly defined and enumerated in national legislation.¹⁰

26. Migrants in detention are sometimes confined in overcrowded locations without adequate health care, food, sanitation or safe drinking water. Some are also subjected to prolonged or indefinite administrative detention, in conditions which have been denounced by the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

⁸ See <http://www.gfmd.org/mexico-2010/>.

⁹ E/CN.4/2003/85, para. 74.

¹⁰ A/HRC/13/30.

27. In line with the above, the Special Rapporteur wishes to recall that detention is a tool that characterizes criminal law as opposed to administrative law, which, by nature, should resort to alternative interim measures to detention. He wishes to stress that the detention of migrants should be a measure of last resort when no alternative options are available. Accordingly, migration law and policy should effectively regulate alternative measures that could be applied and duly monitored, both by administrative and judicial bodies.

3. The improper use of the word "illegal" to label migrants

28. The Special Rapporteur wishes to emphasize that all migrants, regardless of immigration status, are first and foremost human beings, entitled to be treated in a manner that complies with international law and human rights standards and therefore, he wishes to draw the attention of the General Assembly to the inadequacy of using the word "illegal" to refer to human beings in a situation of immigration irregularity.

29. The Special Rapporteur also wishes to highlight that the term "illegal migrant", broadly used in the context of the criminalization of irregular migration is not recognized in international law. He wishes to recall that "irregular" or "non-documented" migrant, as defined by article 5 of the International Convention on the Rights of All Migrant Workers and Members of Their Families, are internationally accepted terms to describe the situation of not having, or having lost, the proper documents that allow migrants either to reside in a given territory or to work there. In his view, labelling human beings as "illegal" is inconsistent with human dignity, particularly in light of the content that the term "illegal" carries with it, tainting migrants with prejudice and criminal suspicion because of its linkages with criminal law and the criminal justice system.

30. The Special Rapporteur wishes to recall that the human rights enshrined in the Universal Declaration of Human Rights and in the core international human rights treaties extend to all migrants, including those who are in a non-documented or irregular situation. This has been repeatedly underlined by human rights mechanisms and is also made explicit by the International Convention on the Rights of All Migrant Workers and Members of Their Families. While some limited differential treatment between regular and irregular migrants may be justified under international human rights law, for example, with regard to political rights and access to certain specific programmes and services, such differential treatment must never encroach on the fundamental rights and liberties that a State must guarantee to all persons under its jurisdiction, irrespective of their immigration status.

4. The profiling of migrant communities

31. Information collected and received by the Special Rapporteur indicates that, in some instances, law enforcement officials routinely use generalizations about ethnicity, religion, race, colour of the skin, or national origin in deciding whom to target for identity checks, stops, searches and sometimes arrest rather than utilizing objective evidence as the basis for making law enforcement and/or investigative decisions on criminal activity and the correlative criminal responsibility. Reports received by the Special Rapporteur also indicate that in some instances racial and ethnic profiling may result from the racist behaviour of individual law enforcement

officials or, in some instances, from institutionalized racist and xenophobic practices, which are contrary to international law and human rights norms.

32. The Special Rapporteur wishes to stress that profiling of immigrant communities and their purported association with criminal activities clearly contrast with principles of human dignity and the prohibition of discrimination.¹¹ Profiling also disproportionately affects migrant communities, making them a target of mass identity checks, raids on homes, businesses and religious sites in the absence of specific evidence. Information received by the Special Rapporteur indicates that in some instances law enforcement officials have been tasked with rounding up and deporting foreigners in order to meet nationally set targets. The Special Rapporteur has also been informed that these practices sometimes target individuals from specific nationalities because repatriation costs are lower to certain countries.

33. From a due-process-of-law perspective, migrant profiling is highly detrimental as the very use of profiling defeats the presumption of innocence. The use of ethnic profiling, wittingly or not, contributes to a growing sense of marginalization of minority and immigrant communities, labelling entire racial, ethnic or religious groups as more likely to commit crimes and thereby signalling to the broader society that all members of that group constitute a threat. This is conducive to the creation of an environment of mistrust, ethnic or racial hatred, racism, racial discrimination, xenophobia and related intolerance, which, in some instances, contributes to the alienation or segregation of entire migrant communities.

34. The Special Rapporteur is informed about the several obstacles to determine in practice if a police action is conducted for immigration or law enforcement purposes when profiling is used, and regrets that States are not sufficiently measuring the impact of their adopted policies. Information gathered by the Special Rapporteur indicates that profiling is widespread and, in some instances, institutionalized and that Governments are not collecting appropriate data in this connection. He also observes with dismay that in some instances law enforcement authorities disclose statistical information on crime that fails to distinguish between immigration offences and other offences. In addition, statistics on stops and searches fail to distinguish between immigration control and crime. This lack of distinction misleads the general public and nurtures a distorted image of widespread criminality among foreigners and migrant communities. He also regrets that gender considerations sometimes exacerbate the use of profiling, for example when anti-trafficking initiatives aimed to prevent the movement of women or immigration restrictions target men from specific nationalities. Other issues of deep concern include the retention of information, such as biometric data, with no regard for the right to privacy.

B. The impact of the criminalization of migration on specific groups

35. The Special Rapporteur notes with concern that the criminalization of irregular migration has particularly negative implications for the protection of human rights of specific groups. He further notices that the reasons that may prompt persons to

¹¹ See A/HRC/4/26, paras. 36 and 40-42. See also Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand*, Berlin and New York, Springer, 2010.

flee their countries of origin do not always coincide with the reasons internationally recognized as grounds for seeking and recognizing the status of refugees, but which nevertheless can leave such persons in a vulnerable situation and in need of protection of their human rights.

36. The Special Rapporteur wishes to draw the attention of the General Assembly to the millions of people who have not been formally denied or deprived of nationality but who lack the ability to prove their nationality, or, despite documentation, are denied access to the many human rights that other persons under the jurisdiction of States enjoy.¹² He also wishes to draw attention to allegations about deportations of persons with mental disabilities without judicial guarantees, including the right to be assisted by a lawyer.

37. The Special Rapporteur is also concerned about the disproportionate use of force by security forces at borders, which, according to information received, has led to shootings and deaths of migrants, asylum-seekers and refugees. In this regard, the Special Rapporteur wishes to recall that international law and human rights standards demand that the use of force by law enforcement officials must be proportionate to the actual threat faced, and wishes to discuss, in the present report, the impact of the criminalization of irregular migration on asylum-seekers, victims of trafficking and children.

I. Asylum-seekers

38. The Special Rapporteur wishes to recall that persons who are in need of international protection are often unable to travel out of their country, or into a safe country, where they can seek asylum. With the increasing use of mandatory visa requirements, asylum-seekers who may not be able to get passports in their country of origin without putting their lives in danger have no option than to resort to irregular means to travel and enter safer territories.

39. The Special Rapporteur is especially concerned at the consequences for asylum-seekers of criminalizing third parties who are deemed to have facilitated irregular entry. The imposition of criminal penalties on carriers who transport asylum-seekers fails to recognize that individuals seeking protection in other countries are often forced to use false documents or resort to smugglers in order to leave their country. Many are unable to obtain proper documentation and permission before fleeing, often because they fear persecution from the same authorities that should issue their travel documents. False or forged documents are used in order to allow them to enter a country where they can seek protection.

40. The Special Rapporteur regrets that laws and practices in many States result in the criminal prosecution of asylum-seekers and refugees for irregular entry, stay or the use of *fraudulent documents, despite this being prohibited by international refugee law*, and despite the fact that it is explicitly against the recommendations of the Executive Committee of the United Nations High Commissioner for Refugees. He further regrets that some countries apply the same penalties for irregular entry to asylum-seekers, including, in extreme cases, whipping.

¹² Indira Goris, Julia Harrington and Sebastian Köhn, "Statelessness: What It Is and Why It Matters", *Force Migration Review*, Issue 32, April 2009.

41. In the Special Rapporteur's view, criminalizing the entry and stay of asylum-seekers, as well as their methods of arrival, increases the vulnerability of asylum-seekers in host countries and feeds into the depiction of asylum-seekers as criminals, along with other so-called "illegals". Furthermore, with the increasing focus of migration management on controlling people and their movements, persons who move irregularly are more likely to be profiled than those who do not. In this regard, the Special Rapporteur is very concerned about the assumption that in practice there is some overlap between the categories of refugee and terrorist¹³ and calls upon States to support the situation of those escaping persecution and danger, taking all necessary measures to address the stereotyping of asylum-seekers and refugees and proscribing detention in the asylum-seeking determination processes.

2. The protection of victims of labour abuse, exploitation and human trafficking

42. The criminalization of irregular migration and the focus of migration management on security and border controls, place serious obstacles in the way of identifying and protecting victims of labour abuse, exploitation and human trafficking. In this regard, the Special Rapporteur recalls that if victims are not identified or, if they are incorrectly identified as "criminals" or "illegal" migrants, enjoyment of their rights and protection are hampered. As recalled by the Special Rapporteur on trafficking, the ability of victims to access the rights they are entitled to can only be ensured by their quick and accurate identification as victims.¹⁴

43. The criminalization of irregular migration further limits victims' access to justice and protection and decreases the likelihood that they will report abuse to authorities. The added fear of criminal prosecution and punishment further prevents trafficked and smuggled persons from seeking protection, assistance and justice. The Special Rapporteur observes that recent border control measures aimed at tightening and preventing clandestine entry, including joint border enforcement operations in transit States or at sea, have had troubling effects on the victims.

44. The Special Rapporteur wishes to refer especially to trafficked victims, as he has received information on persons being trafficked and charged with illegal entry or forging of documentation, disregarding their condition as victims of transnational organized crime. Victims are then re-victimized by the criminal justice system and are trapped in a vicious circle of multiple forms of discrimination and victimization.

45. The Special Rapporteur regrets that States have adopted increasingly aggressive anti-smuggling and anti-trafficking laws and policies, with a criminalization and law enforcement focus, without regard to other key elements such as the fundamental human rights obligations of States. He expresses concern about legislation in some States, which effectively allows victims of trafficking to be treated as criminals rather than victims of crime. Trafficked or smuggled, irregular migrants are in many instances prosecuted or detained because of their irregular migration or labour status as well as for using forged documentation, having left or entered a country without authorization, begging or for having worked in the sex industry. In this regard, he wishes to stress that victims of trafficking must be treated as victims of crime and protected against criminalization, including by

¹³ Elspeth Guild and Paul Minderhoud, eds., *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings*, 2006, Martinus Nijhoff.

¹⁴ A 64 290.

adopting laws that protect trafficked persons from prosecution or punishment for trafficking-related offences such as holding false passports or working without authorization.

46. In line with the above, the Special Rapporteur wishes to highlight that States should provide assistance to victims of trafficking irrespective of their cooperation in relation to judicial proceedings, and invites States to strengthen efforts to improve victim identification processes and the corresponding referral mechanisms, including referral to asylum-seeking systems, where appropriate.

3. The protection of children

47. The Special Rapporteur continues to observe, as highlighted in his 2009 report to the General Assembly,¹⁵ that many countries still allow migration-related detention of children, in contravention of the best interests of the child. He also regrets the lack of “benefit of the doubt” in age-assessment processes for migrant children, the detention of unaccompanied minors, and in general, the detention of children in facilities that are unsuited for them and/or their families. In his view, the absence of a child and adolescent perspective in migration management is particularly worrisome with regard to immigration detention.

48. The Special Rapporteur wishes to insist that migrant children should not be detained on the basis of their migration status or that of their parents. In his view, detention of children (either unaccompanied or with families) will never be in their best interests and that States should provide alternative measures to detention and confinement for all children subject to immigration control procedures.¹⁶ He also wishes to insist that immigration related detention of children should not be justified on the basis of maintaining the family unit (for example, detention of children with their parents when all are irregular migrants). As stressed by the United Nations Children’s Fund (UNICEF), the Committee on the Rights of the Child and others, detention of children will never be in their best interests. Hence, the ideal utilization of a rights-based approach would imply adopting alternative measures for the entire family. States should therefore develop policies for placing the entire family in alternative locations rather than closed detention centres.

49. The Special Rapporteur wishes to draw the General Assembly’s attention to the impact and consequences that immigration-related detention of adults may have on their children, particularly in connection with their rights to development, family life and mental health. In his view, adopting a child-rights approach, which considers the child’s best interests, will require alternative policies to address the migration status of their parents, including measures that facilitate regularization, access to social rights and family unity, rather than resorting to the criminal justice system.

50. The Special Rapporteur is especially concerned about the protection of the human rights of children who are subject to deportation and wishes to insist on the importance of respecting the best interests of the child in such procedures. Furthermore, he reiterates his encouragement to States to give consideration to the principle of non-deportation of unaccompanied children and the principle that

¹⁵ A/64/213 and Corr.1, para. 97.

¹⁶ A/HRC/11/7, para. 43.

children should be repatriated only if it is in their best interests, namely, for the purpose of family reunification and after due process of law.

51. The Special Rapporteur also wishes to draw the General Assembly's attention to the dearth of qualitative and quantitative information regarding the experiences of migrant children (both unaccompanied and with their families) within migration control measures (e.g., information about their treatment at borders and in detention centres). He also wishes to draw attention to the increase of exploitation of migrant children for economic purposes and regrets that indicators on these issues are absent in most transit and destination countries, and that monitoring mechanisms both governmental and non-governmental, are quite scarce.

C. Examples of good practices and alternatives to the criminalization of irregular migration

52. In discharging his mandate, the Special Rapporteur has come across a number of initiatives, activities and policies implemented by Governments, intergovernmental and civil society organizations and the private sector that reflect commitment to the realization of human rights while managing irregular migration. The Special Rapporteur wishes to highlight a number of those practices, policies and programmes and, while emphasizing that the list is not exhaustive, to encourage all parties to submit to him information on other pertinent practices, policies and programmes.

1. Good practices

53. In the Special Rapporteur's view, creating opportunities for regular migration is a key strategy to address the root causes of irregular migration and discourage migrant smuggling and human trafficking. In this regard, he welcomes regional integration frameworks, such as the European Union, the Southern Common Market (MERCOSUR) and the Economic Community of West African States (ECOWAS), all of which favour labour mobility through legal migration channels. The Special Rapporteur wishes to highlight some practices aimed at promoting human rights-based approaches to migration management and at regularizing the situation of non-documented migrants on a large scale.

(a) International frameworks for rights-based partnerships on migration management

54. The Special Rapporteur also welcomes the adoption of international frameworks for rights-based partnerships on migration management by international organizations and commends the global efforts of those organizations to create knowledge-sharing tools to promote a rights-based approach to migration management. He celebrates the adoption, in 2005, by the International Labour Organization (ILO) of its multilateral framework on labour migration, based on a set of non-binding principles and guidelines for a rights-based approach to labour migration. This initiative is based on research, global labour migration practices and principles contained in relevant international instruments and international and regional policy guidelines, including the International Agenda for Migration Management. It also includes the collection of examples of best practices, which have been broadly publicized by ILO. In the Special Rapporteur's view, the collection of good practices is a valuable means to provide practical guidance to

Governments and other stakeholders with regard to the development, strengthening and implementation of more effective and rights-based national and international labour migration policies.

55. The Special Rapporteur also praises the adoption of the 10-point plan of action by the Office of the United Nations High Commissioner for Refugees (UNHCR) in 2007. The plan is a tool to assist all stakeholders in migration management policies, especially in the context of mixed migratory flows where protection initiatives are particularly required. In his view, the 10 areas addressed in the plan should feature prominently in migration management initiatives and activities in countries of transit and destination. The areas are: cooperation among key partners; data collection and analysis; protection-sensitive entry systems; reception arrangements; mechanisms for profiling and referral; differentiated processes and procedures; solutions for refugees; addressing secondary movements; return arrangements for non-refugees and alternative migration options, and information strategy. The Special Rapporteur commends the impact of the plan, which inspired the development of protection initiatives in various regions and which were compiled in 2009 by UNHCHR. He welcomes the compilation as a knowledge-sharing tool that provides practical guidance for the implementation of the 10-point plan in action.

(b) Large-scale regularization programmes

56. The Special Rapporteur wishes to highlight the fact that creating opportunities for regularizing the situation of non-documented migrants constitutes, in his view, a rights-based alternative to managing irregular migration without resorting to its criminalization.

57. The Special Rapporteur welcomes recent large-scale regularization programmes, which improve the enjoyment of human rights by migrants, particularly economic and social rights, and contribute to their integration in countries of destination. In this regard, he concurs with the United Nations High Commissioner for Human Rights, who stressed that this approach recognizes that migrants who do legal and decent work are likely to contribute more to development than those who are economically exploited and socially excluded.¹⁷

58. The Special Rapporteur observes that large-scale regularization programmes are usually part of a multi-pronged strategy. They are aimed at incorporating workers in the informal "underground" economy into the formal economy, and in that way, to increase their contributions to national tax and social security revenues, limit workers exploitation and abuse and discourage migrant smuggling and human trafficking. He also observes that these programmes usually specify requirements of potential beneficiaries, including length of residence, proof of work and, in some instances, proof of social welfare contributions, age range and nationality (when the regularization programmes target migrants from countries with cultural and historical connections with the host country).

59. The Special Rapporteur welcomes the positive impact that recent large-scale regularization exercises have had on the lives, working conditions and realization of

¹⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR), Migration and Development: a Human Rights Approach, Geneva, 2008, para. 47, available from: <http://www2.ohchr.org/english/bodies/cmw/docs/HLMigration/MigrationDevelopmentHC'spaper.pdf>.

the human rights of former irregular migrants. The Special Rapporteur wishes to mention an illustrative number of examples of these programmes, which have been implemented in some countries in the Latin American region. Between 2002 and 2006, Mexico implemented a large-scale regularization programme, which included 15,000 non-documented migrants, mostly from countries in Central America. In 2008, Mexico adopted a new regularization programme for undocumented migrants who entered its territory before 2008, to be implemented between November 2008 and May 2011. The Bolivarian Republic of Venezuela implemented "Mission Identidad" (Identity Mission) between 1998 and 2006, which benefited approximately 415,000 irregular migrants who had lived undocumented in the country for many years.

60. The Special Rapporteur wishes to draw special attention to the large-scale regularization programmes in Argentina, which have been implemented in the context of the economic and financial crisis and have been used by the Government as a strategy and an effective tool to successfully overcome the crisis. In 2004, Argentina adopted its "Patria Grande" programme, including Decree No. 1169, which included a comprehensive approach to address irregular migration under the framework of the Migratory Law (Act 25875). The latter framework establishes that nationals of States Members MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) or associate States (Bolivia (Plurinational State of), Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela (Bolivarian Republic of)) with no criminal background can obtain legal residence in Argentina. This programme has benefited 800,000 irregular migrants and contributed to a decrease in both the number of undocumented migrants and the unemployment rate.¹⁸

61. Large-scale regularization programmes in Brazil (2009), Chile (2007-2008) and Ecuador (2009-2010) are additional good examples from the Latin American region.

2. Promising policies and programmes

62. Creating legal options to address the situation of persons who are not deemed refugees but who may require international protection on an individual basis is one of the most promising policies and programmes that have been drawn to the Special Rapporteur's attention. Promising measures in this regard include the "discretionary leave to remain" and the "humanitarian protection leave" available in the United Kingdom of Great Britain and Northern Ireland, which can be granted for a maximum three-year period and which are available to individuals who have not been considered for international protection or who have been excluded or to persons, who, if returned to their countries, might face serious risk to their life arising from the death penalty, unlawful killing, torture or inhuman or degrading treatment or punishment. Similarly in Germany, the commissions for hardship cases, established as part of the German Residence Act of 2005, may recommend granting a residence permit to unsuccessful asylum-seekers who, otherwise, would be obliged to leave the country. This mechanism enables the authorities to review the individual circumstances of the applicants beyond the requirements set up in the international refugee regime.

¹⁸ United Nations High Commissioner for Refugees, 10-point plan expert round table No. 3, "The return of non-refugees and alternative migration options" (Geneva, 30 November-1 December 2009), summary report, December 2009, available from: <http://www.unhcr.org/refworld/docid/4ba9ddd22.html>.

63. The Special Rapporteur has received information on some promising legal provisions aimed at replacing immigration detention. Information received indicates that alternatives to immigration detention may vary from cost-effective options already available in several legal systems such as release on bail, bond and surety, conditional release, return to custody for specified hours following release for employment, schooling or other defined purposes, to more innovative schemes such as open and semi-open centres, directed residence and restrictions to a specified district. Information received by the Special Rapporteur indicates that examples of legal presumption against immigration detention are found, inter alia, in the legislation of Austria, Brazil, Denmark, Finland, Ireland, Lithuania, New Zealand and Switzerland.

64. The Special Rapporteur also welcomes the adoption of legislation in Panama (Migration Law No. 3, February 2008, article 93), which explicitly proscribes the detention of children. These examples illustrate that States alone or in cooperation with other stakeholders may successfully resort to alternatives to the criminalization of irregular migration or align their laws with international law and human rights standards.

65. The Special Rapporteur welcomes the interest and activities undertaken by international organizations and civil society to explore, together with Member States and other stakeholders, alternative measures to immigration detention as a way to help States improve their compliance with their human rights obligations in relation to the treatment of migrants. In this regard, the Special Rapporteur praises the pilot project on alternatives to detention for families with children who are awaiting return that has been carried out in Belgium since October 2008 as a practical and positive example of greater cooperation between Governments and civil society in monitoring and evaluation of alternative measures to detention.

IV. Conclusions and recommendations

66. The enjoyment of human rights by migrants, regardless of immigration status, is a crucial means to ensure equitable human development and social development and justice for migrants. Migrants can play an active role in the social and economic development of host countries and contribute to the development of countries of origin and transit, particularly when their human rights are fulfilled in a manner that ensures equal opportunities and gender equality. Human rights, together with gender and age-sensitive strategies, should therefore feature prominently and systematically as an integral part of the overall strategy to achieve development in the context of migration.

67. Migration governance should be clearly human-centred, and grounded in human rights law, and it should therefore recognize the inherent dignity of every human being, promote equality and the prohibition of discrimination and fully incorporate the principle of equal opportunities and choices for all so that everyone, regardless of immigration status, can develop their own unique potential and have a chance to contribute to development and social progress.¹⁹

¹⁹ See Amartya Sen, *Development as Freedom*, Oxford University Press, 1999; United Nations Development Programme, *Human Development Report 2009: Overcoming barriers: Human mobility and development*.

Ensuring that all migrants, regardless of their immigration status, enjoy their internationally recognized human rights at all stages of the migratory processes in countries of origin, transit and destination should be the guiding principle of migration governance.

68. In the Special Rapporteur's view, the international community has created an important momentum for enhanced international cooperation in addressing the multifaceted issues raised by the international movement of people, as advocated by the Secretary-General in his report on international migration and development in 2005.²⁰ In his view, it is imperative that human rights are fully incorporated in all migration-related processes and that a rights-based approach to migration features prominently at the policy and decision-making levels on migration governance-related issues. In light of the foregoing, the Special Rapporteur wishes to put forth a number of general recommendations for further consideration and action.

A. A rights-based approach to migration governance

69. States should effectively promote and protect the human rights and fundamental freedoms of all migrants, especially the rights of women and children, regardless of their immigration status, in conformity with the Charter of the United Nations and international human rights law and standards.

70. States that have not done so should incorporate the applicable legal framework on human rights, the protection of the child, the protection of migrant workers and their families, the protection of asylum-seekers and refugees, the fight against transnational organized crime and the elimination of contemporary forms of slavery into their national laws and policies as well as into their bilateral, subregional and regional agreements for migration management.

71. Efforts directed to adopt a human rights-based approach to migration governance should be redoubled. States and other stakeholders should systematically be guided by, and further the realization of, human rights standards contained in and principles derived from the Universal Declaration of Human Rights and other international human rights instruments, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in all migration initiatives, including those implying multi-stakeholders cooperation and technical assistance and in all phases of the migration process.

72. The Special Rapporteur also recommends that States:

(a) Review their national policies to harmonize them with existing international, regional and subregional frameworks on rights-based approaches to migration;

(b) Implement the policy options referred to in ILO Convention No. 143 and its accompanying Recommendation No. 151, particularly in light of the particular problems faced by irregular migrant workers and other vulnerable migrant workers as a result of their status.

²⁰ A/60/205.

B. Decriminalizing and managing irregular migration

73. States should remove laws, policies, plans and programmes aimed at criminalizing irregular migration and should not consider breaches of immigration law a crime or punish such breaches with detention.

74. In line with the foregoing, the Special Rapporteur recommends that States:

(a) Undertake policy reforms to remove detention as a punishment for breaches of immigration laws and policies;

(b) Until such reforms are into effect, States should take all possible measures to suspend the application of detention as an anti-immigration measure and ensure that immigration detention is not applied to asylum-seekers, children (whether unaccompanied or with families) or victims of trafficking, labour exploitation and abuse, or to other vulnerable groups.

75. States should consider that irregular migrants are generally in a very vulnerable condition and that irregularity is due to several factors (including restrictive migration policies, social exclusion and marginalization as well as demand for labour in countries of destination). States should accordingly:

(a) Adopt integrated and protective approaches, instead of approaches that are punitive and based solely on security and border control concerns;

(b) Design and implement programmes, plans and policies to address irregular migration in a comprehensive and holistic way, without resorting to its criminalization;

(c) Take into account the root causes of migration and the importance of creating legal channels for migration in policymaking initiatives so that they can be comprehensive, human-centred and incorporate human rights;

(d) Promote multi-pronged and multi-stakeholder initiatives, preferably including civil society and migrants themselves (such as research, advocacy strategies, policy discussions, etc.) in order to examine the context-specific and human rights-based options to address irregular migration.

1. Regularization policies, plans and programmes

76. States are encouraged to adopt and promote regularization programmes, plans and policies as a crucial strategy for ensuring migrants' rights, prevent human rights violations and abuses associated with irregular migration, address marginalization and facilitate the integration of migrants and their families in the communities of destination.

77. States are particularly encouraged to:

(a) Develop public policies to regularize non-documented migrants (especially children and their families) through flexible, permanent and regular legal avenues and by extraordinary regularizations aimed at contributing to the social integration of the large number of irregular migrants living in host societies;

(b) Consider regularization programmes as a key element of migration policies in order to ensure social integration and family reunification, limit

migrant workers' exploitation and abuse and incorporate workers from informal and underground economies into the labour force, with clear benefits for host countries, including increasing contributions to national tax and social security revenues;

(c) Consider creating regularization options for persons who may not fall under the international refugee regime but who may need to have their human rights protected and consider granting legal residence to children and adolescent victims of abuse and exploitation as a durable solution, in line with the best interests of the child;

(d) Ensure that regularization policies are sustainable and respectful of human rights norms, inter alia, by incorporating provisions to protect migrants from reprisals from their employers who might prefer that they remain in an irregular status.

2. Managing massive and mixed migratory flows

78. States should not resort to collective deportations, which are contrary to international law and human rights standards. States should have regular monitoring mechanisms to prevent collective deportations and ensure that all removal or deportation orders and decisions comply with the safeguards recognized in article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

79. States should ensure that their border control and anti-smuggling efforts are carried out in a manner that respects and protects human rights, does not interfere with search and rescue obligations, and does not block access to asylum procedures and the identification of trafficked victims.

80. The Special Rapporteur encourages the establishment and implementation of institutionalized services and programmes to provide comprehensive support and protection to persons arriving in mixed migratory flows, especially women, children and the elderly, including means to detect those who are in need of international protection. Protection services should include access to humanitarian assistance in the first instance, including adequate food and water, and access to health services, legal advice and effective asylum procedures. Longer term needs should include access to durable solutions in the case of persons in need of international protection and support for return to the community of origin for those people who are deemed able to return with no risk to their human rights.

81. The detention of children and adolescents through border control measures, such as interception at sea, should be addressed through a child protection approach. Similarly, migration authorities responsible for the mistreatment of children should be held fully accountable.

C. Preventing ethnic profiling of migrant communities, hate crimes, racism, racial discrimination, xenophobia and related intolerance

82. States should prohibit ethnic profiling of migrant communities as a form of discrimination.

83. States should encourage greater harmony, tolerance and respect for migrants, asylum-seekers and refugees within the wider society, with a view to eliminating acts of racism, xenophobia and other forms of related intolerance directed against migrants.

84. In particular, States should:

(a) Develop or strengthen programmes, including ensuring civil society participation, meant to tackle xenophobia in public speech and the media and discrimination and intolerance against migrants and their families;

(b) Ensure that effective remedies are available to victims of racism, racial discrimination, xenophobia and related intolerance and monitor the responses of the judicial system to allegations of xenophobia and hate crimes against migrants, with due regard for age and gender considerations;

(c) Implement intercultural policies aimed to raise children in an environment that accepts and values differences, discouraging racism and xenophobia and fostering children's participation in the design and implementation of such policies;

(d) Strengthen awareness-raising programmes to combat prejudice against migrant communities and increase awareness-raising efforts to prevent abusive practices by employers, regardless of immigration status.

D. Finding alternatives to immigration detention

85. States that continue to punish irregular migration with imprisonment should revise and reform their immigration laws and decriminalize irregular migration. States should not deprive migrants of their right to liberty because of their migratory status.

86. The causes and circumstances leading to the deprivation of the liberty of migrants should be defined by laws that should provide adequate and effective remedies, including judicial review, in order to avoid arbitrary detention and guarantee access to legal services.

87. In cases where, exceptionally, detention of migrants is justified, this should not be made in facilities for criminals. Migration-related detention centres should not bear similarities to prison-like conditions. In connection with immigration detention facilities, States should bear in mind that:

(a) Authorities in charge of these facilities should not be security forces;

(b) States should hold private security firms that are hired to police immigration detention facilities accountable for upholding the rule of law and compliance with human rights;

(c) Officials working in immigration detention facilities should be trained in human rights, cultural sensitivities, age and gender considerations and the particular needs of vulnerable populations;

(d) Disciplinary rules should be markedly different from those in place in prison facilities;

(c) Social protection (including access to education, health care, recreation and legal assistance), as well as contact with family in both countries of destination and origin, should be guaranteed: contact should also be facilitated with immigrant communities in destination countries and civil society institutions.

88. States should allow consular access to and independent scrutiny and control mechanisms of the conditions of immigration detention (judicial authorities, international and local non-governmental organizations, civil society, international human rights mechanisms, consular services and humanitarian institutions).

89. Policies should guarantee the enforcement of such alternatives by administrative and judicial authorities.

90. States should consider and use alternatives to immigration detention in accordance with international law and human rights standards. Detention should not be considered necessary or proportionate if other less restrictive measures to achieve the same legitimate objective have not been considered and assessed.

91. Alternatives to detention should be available to all irregular migrants and asylum-seekers, whether documented or undocumented. Recourse to alternative measures should be based on an individual assessment of the migrant's particular circumstances and be available in practice without discrimination.

92. Alternative measures should be systematically considered by States before resorting to immigration detention. States should ensure that the conditions and criteria to choose alternative measures do not discriminate in law or practice against particular groups of non-nationals, whether on the basis of their origin, economic situation, immigration or other status. These means also should be:

(a) The least intrusive and restrictive in order to attain the same objectives of immigration-related detention, such as avoiding that migrants abscond and guaranteeing their presence in court or at administrative proceedings;

(b) Subjected to legal review and migrants should therefore be granted the possibility of challenging them before a judicial or other competent and independent authority or body.

93. States should provide alternatives to detention for family groups when parents are detained on the sole basis of migratory status, keeping in mind the necessary balance between the need to protect family unity and the best interests of the child. In all decisions concerning children, the best interests of the child should be the primary consideration.

94. States should enact and use a broad range of alternative measures. In developing such measures, States should draw on some of the existing practical alternatives already applied in some States. Alternative measures may include registration requirements; reporting or monitoring conditions; the deposit of a financial guarantee; or an obligation to stay at a designated address, an open centre or other special accommodation. Reporting requirements, where used, should not be unduly onerous, invasive or difficult to comply with. Bail, bond and surety should be made available to irregular migrants under conditions

that are reasonable and realistic. The use of open centres, directed residence or special accommodation should be developed, with open centres preferred over more restrictive alternatives.

95. Non-custodial measures, such as reporting requirements, should always be explicitly considered before resorting to detention, with the least restrictive measures considered first. The application of alternative measures must itself be governed by international human rights standards, including the basic principles of legality, necessity and proportionality, as well as non-discrimination. Alternative measures must take into account the particular situation of irregular migrants and asylum-seekers, including their frequently unstable financial or housing situation. If any measure is applied unnecessarily or disproportionately, in a discriminatory manner or without due regard to individual factors such as the particular vulnerability of an individual, it could amount to a restriction inconsistent with international human rights standards. Safeguards surrounding alternatives to detention should be as rigorous as those applied to situations of detention, including ensuring that the alternative measure is established in law, is non-discriminatory in purpose and effect and is subject to judicial review, and that the migrant has access to legal counsel. States should always use the least restrictive means necessary as alternatives to detention.

96. States should endeavour to develop these alternatives in consultation with local non-governmental organizations with expertise in meeting the needs of migrants. This could be done, for example, through joint initiatives between Government authorities and non-governmental organizations for release and supervision of irregular migrants.

E. Protecting specific groups

1. Protection of asylum-seekers

97. The Special Rapporteur recommends the development of standardized procedures to ensure access to asylum procedures as well as an assessment of the situation in the country of origin or habitual residence of the rejected asylum-seekers before deciding on their repatriation. In this regard, States should follow the several country-specific guidelines issued by UNHCR in order to avoid returning rejected asylum-seekers whose appeals have been exhausted to countries where they may be at risk of human rights violations.

98. States should not consider asylum-seekers as irregular migrants and should follow the guidance provided by UNHCR not to detain asylum-seekers but to house them in open reception centres.

99. States are encouraged to incorporate gender and age considerations into their asylum determination procedures.

2. The protection of children

100. States should ensure the protection of the child in all migration-related circumstances regardless of his or her individual or family immigration status and take the best interest of the child as a primary consideration in all migration-related initiatives and actions concerning children at all levels.

101. Detention of children should be a measure of last resort and should be for the shortest period of time possible. The deprivation of liberty of children in the context of migration should never have a punitive nature, accordingly:

(a) The exceptional migration related detention of children should be executed in places ensuring the integral protection and well-being of the child, taking due consideration of the fulfilment of the child's rights, *inter alia*, to education, health care, recreation, consular assistance and legal representation;

(b) States should bear in mind that children should be kept separate from non-related adults; if housed with families, they should have accommodation distinct from other adults.

102. The Special Rapporteur encourages the conclusion of bilateral and multilateral agreements based on existing international human rights norms and standards and increased cooperation at the regional level to protect migrant children, especially those unaccompanied, including in matters of safe repatriation, the fight against trafficking, sexual exploitation and smuggling and assistance to victims.

103. States should base any decision to return a child or a child's parents to the country of origin on the best interests of the child, including the right to family unity and education.

104. States should uphold the principle of avoiding statelessness and enforce legal norms at the national and international levels to reduce statelessness resulting from the failure to register the birth of a child, including because of the fears associated with the criminalization of irregular migration. States should take effective measures to guarantee the birth registration of children born outside their parents' country of origin, regardless of the parents' immigration status.

105. States should ensure that age-assessment processes comply with international standards and that the persons concerned are allowed access to effective remedies to challenge age-assessment decisions. States should also consider according a "benefit of the doubt" in age-determination procedures.

106. The Special Rapporteur encourages the design and implementation of programmes for the sustainable return and reintegration of children, including alternatives to return on the basis of the best interest of the child.

3. The protection of victims of trafficking, labour abuse and exploitation

107. The Special Rapporteur further recommends that Governments:

(a) Take all necessary steps to prevent multiple discrimination and re-victimization, ensuring that effective structures and mechanisms are put in place to assist victims to reintegrate into society, including by providing them with psychological, health and social assistance;

(b) Incorporate into national policies, plans and programmes, and effectively implement, the Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1);

(c) Consider signing the Convention on Action against Trafficking in Human Beings of the Council of Europe, which is open to non-member States,

as a means to strengthen the legal framework and mechanisms for the protection of trafficked victims.

F. Information-sharing, data and analysis

108. States should strengthen efforts to collect data and measure the impact of their migration policies on the enjoyment of human rights by migrants and societies at large at all stages of the migration process.

109. States are especially encouraged to share information about key indicators of the impact of migration programmes, plans and policies to address irregular migration, as well as common challenges and best practices at all levels across boundaries and regions.

110. Stakeholders should make available statistical and substantive information on, *inter alia*:

- (a) The root causes of migration;
- (b) The demand of migrant labour, including irregular migrant labour, in countries of destination;
- (c) The distinction between immigration control and crime prevention.

111. The Special Rapporteur recommends the compilation and sharing of best practices in addressing irregular migration to help States and other stakeholders to develop human rights-based public policies.

112. States should develop awareness-raising campaigns in countries of origin, transit and destination to alert potential migrants about the possible dangers of irregular migration and to inform them of the existing protection mechanisms.

G. Recommendations on international cooperation

113. States should recognize the important role played by consular offices in the protection of migrants and ensure that they are sufficiently resourced and given an explicit mandate to intervene on behalf of their nationals who are in irregular situation, including those in detention centres. The Special Rapporteur encourages consular offices to share good practices and strengthen cooperation.

114. The mass media should contribute to building trust and cooperation between migrants and host societies, regardless of immigration status, *inter alia*, through campaigns aimed at showing that irregular migration is distinct from crime and criminality.

115. Human rights mechanisms, namely special procedures, treaty bodies and the universal periodic review mechanism should continue to pay special attention to the rights of migrants and the impact of the criminalization of irregular migration on the enjoyment of human rights by migrants.

116. The Special Rapporteur encourages the Global Migration Group to establish mechanisms to monitor State practices on migration management and

share good practices in the harmonization of the management of migration with international law and human rights standards.

117. The Special Rapporteur welcomes policymaking discussions on migration in international policy platforms. The Special Rapporteur also welcomes the efforts made by the Global Migration Group to tackle migration issues from a human rights perspective, to be led by OHCHR. He also encourages inter-institutional coordination at the national level, including through specific mechanisms and with the participation of civil society, consular services, local governments and the private sector, for the development and implementation of migration policies that adopt a human-centred perspective.



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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights defenders

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the present report, submitted by the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in accordance with General Assembly resolution 62/152.

* A/65/150.



Report of the Special Rapporteur on the situation of human rights defenders

Summary

The present report focuses on responsibility for human rights violations against defenders by non-State actors. The introductory part recalls that the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms is addressed not only to States and human rights defenders but to all individuals, groups and organs of society.

The first part of the report identifies armed groups, private corporations, individuals and the media as the categories of non-State actors to be addressed by the Special Rapporteur in the framework of the report as well as the types of violations they commit. The Special Rapporteur then addresses the scope of their responsibility for violations of the rights of defenders, including the corporate responsibility to respect human rights.

The second part of the report surveys States' obligations under international law with respect to human rights violations against defenders by non-State actors. The Special Rapporteur argues that a State's duties to respect and protect human rights include a duty to protect defenders against human rights violations by third parties. State responsibility can therefore be engaged for violations by non-State actors in specific situations. Furthermore, a State's obligation to provide victims of human rights violations with an effective remedy is also reaffirmed.

The report concludes with recommendations to States and non-State actors aimed at ensuring that they fulfil their obligations and responsibilities.

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I. Introduction

1. The Special Rapporteur has, on various occasions, expressed her concern at the continued targeting of human rights defenders by non-State actors. She has therefore decided to devote her thematic report to the General Assembly to violations committed against defenders by non-State actors and their consequences for the full enjoyment of rights by defenders. The term "non-State actor" encompasses people, organizations, groups and corporations not composed of State agents or not being State organs.
2. Although States bear the primary responsibility for protecting human rights defenders, it is necessary to recall that the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms is addressed not only to States and human rights defenders but to all individuals, groups and organs of society. Article 10 of the Declaration states that "No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms". Non-State actors are thus included and therefore have a responsibility to promote and respect the rights enshrined in the Declaration and, consequently, the rights of human rights defenders.
3. The report will first identify the non-State actors most commonly involved in violations of the rights of defenders and the types of violations they commit. The Special Rapporteur will then address the responsibility of non-State actors to respect the rights of defenders. States' obligations to protect the rights of defenders against abuses by third parties will also be discussed.

II. Human rights violations by non-State actors

A. Types of perpetrators and patterns of violations

4. The present report does not aim to identify all categories of non-State actors involved in human rights abuses against defenders, as this group is too broad and diverse. Rather, it is the intent of the Special Rapporteur to highlight the types of violations they commit and their responsibilities. The report will therefore focus on armed groups, private corporations, individuals and the media, as these are the non-State actors most regularly accused of violating the rights of defenders. Conclusions and recommendations are addressed to various stakeholders, as well as to all non-State actors, including those not discussed in the report.

1. Armed groups

5. This category of perpetrators notably includes rebels, paramilitaries, mercenaries and militias. This list is not exhaustive and does not exclusively include armed groups fighting against Governments in the context of an international or non-international armed conflict, as many violations committed by armed non-State actors can also occur during peaceful times and during states of emergency.
6. During times of armed conflict or states of emergency, human rights defenders are at great risk of being targeted by non-State armed groups. Defenders denouncing impunity and violations committed by armed groups are harassed and, consequently,

work in a state of fear. In particular, their mental and physical integrity is at risk, as they often live in regions under the control of non-State armed groups or wherein these groups operate. In addition to being threatened and harassed by militias, warlords and other armed groups, women human rights defenders are, in addition, often subjected to rape and other forms of sexual violence because of their work. Human rights defenders helping victims to access justice for violations of human rights law or international humanitarian law, either locally or before regional or international tribunals such as the International Criminal Court, are also regularly subjected to threats, violence and harassment. In particular, the Special Rapporteur has received information about lawyers receiving death threats because of their work in defence of victims of international crimes. Humanitarian workers are also targeted by non-State armed groups and thus prevented from providing humanitarian assistance to victims of armed conflicts. Furthermore, in the context of civil conflict, paramilitaries often attempt to stigmatize the work of human rights defenders and legitimize campaigns of violence against them by alleging that they are associated with armed groups or "terrorists". In such cases, it is vital that the Government publicly reaffirm the importance of the work carried out by human rights defenders and denounce any attempts at its delegitimization or stigmatization.

7. Defenders are also the victims of attacks by non-State actors, in time of peace. Evidence shows that, in certain countries, paramilitary groups make death threats against human rights defenders who advocate land rights and denounce the granting of mining concessions. Several leaders of communities fighting for economic, social and cultural rights have also been killed, allegedly by paramilitaries.

8. Also of concern are attacks committed against defenders by non-State armed groups which are directly or indirectly instigated by States. Information received by the Special Rapporteur indicates that certain States have allegedly been involved in violations committed against defenders by providing non-State armed groups with weapons and/or logistical support or by condoning their actions, explicitly or implicitly. In certain cases, States have also used non-State armed groups to commit human rights violations against defenders; such violations include killings. In one such case, the Special Rapporteur was "notably disturbed to learn that some information illegally obtained by DAS [Department of National Security] had been transmitted to paramilitary groups in the form of a hit list of defenders, which had led to the killing of four human rights defenders" (A/HRC/13/22/Add.3, para. 135). In certain regions, although States claimed that certain armed groups had been demobilized, former members of those groups were allegedly still operating under the supervision of the central authorities. Information received by the Special Rapporteur indicates that in certain instances, former members of paramilitaries continue to threaten and attack human rights defenders.

2. National and transnational corporations

9. A number of human rights violations against human rights defenders are committed by private corporations, a category that should be understood as consisting of companies, whether national or transnational, not owned or operated by Governments.¹ Private corporations have allegedly been impeding the activities of defenders working, *inter alia*, on labour rights, the exploitation of natural resources, the rights of indigenous peoples and minorities.

¹ The terms "companies" and "corporations" are used interchangeably in the present report.

10. Private companies operating in certain mineral-rich countries have also indirectly been involved in violations of the rights of human rights defenders. The Special Rapporteur has received information about instances in which security guards employed by oil and mining companies have allegedly threatened to kill, harassed and attacked human rights defenders protesting against the perceived negative impact of the companies' activities on the enjoyment of human rights by local communities.

11. In several cases brought to the attention of the Special Rapporteur, it has been alleged that local authorities had colluded with the private sector or that private companies had aided and abetted the commission of violations against human rights defenders.

12. The former Special Representative had received information on numerous instances in which "employers collude among themselves and with the local labour department and immigration authorities against workers who raise labour rights concerns" (E/CN.4/2004/94/Add.1, paras. 61-69). Private companies have also reportedly provided information to the State leading to the conviction of several defenders who had been calling for democratic reforms through the Internet. In one particular case, a Web-search engine company was sued by defenders for reportedly having aided and abetted State violations against them. A private settlement was agreed upon by the parties, but new lawsuits have since been filed against the same company by different plaintiffs.²

3. Other types of non-State actors

13. The Special Rapporteur has received information about numerous threats made against defenders through anonymous telephone calls, text messages, letters or raids on premises committed by isolated individuals. Several defenders have received death threats through text messages following their involvement in human rights activities at the local level or abroad.

14. In the context of the defence of economic, social and cultural rights, defenders are also being attacked by individuals such as landowners. In one such instance, the leader of a group of indigenous people was shot by gunmen reportedly employed by a local landowner, who wounded him in the head, shoulders and right arm with a 12-calibre rifle.³ Individual armed assailants have also been involved in attacks against trade unionists, peasants' leaders and campesinos (farmers or farm workers).

15. In certain countries, attacks have been perpetrated against defenders supporting indigenous communities affected by gold and silver mining by transnational companies. The Special Rapporteur received information about individuals attacking defenders who were demonstrating against violations of the rights of indigenous communities as a result of mining activities.

16. In addition, the information received indicates that community leaders and faith-based groups are increasingly resorting to the stigmatization of, and attacks against, defenders working on issues such as the rights of lesbian, gay, bisexual and transgender persons (A/HRC/4/37/Add.2, para. 32), violence against women and domestic violence. In numerous instances, defenders have been threatened with

² *Xiaoning et al v. Yahoo! Inc et al* (California Northern District Court, case filed on 18 April 2007) (joint stipulation of dismissal following a private settlement between parties).

³ See A/HRC/4/37/Add.1, paras. 85-100, and A/HRC/4/37/Add.2, para. 16.

ostracism or pressured to stop their work in defence of human rights. Furthermore, the information received shows that women human rights defenders working in the area of domestic violence and other types of violence against women are often pressured by the family members of victims or threatened by the perpetrators or their own family members to drop cases.⁴

The role of the media

17. A number of cases brought to the attention of the Special Rapporteur indicate that the media are also involved in violations committed against human rights defenders, notably in relation to violations of their right to privacy. In certain States, human rights defenders have been subjected to denigration campaigns in the press (although sometimes the perpetrators were State-owned outlets). The Special Rapporteur strongly condemns such stigmatization, which often causes defenders to be portrayed as “troublemakers” and consequently legitimizes attacks against them.

18. The Special Rapporteur has been made aware of cases in which newspapers have directly incited homophobia or portrayed defenders working on lesbian, gay, bisexual and transgender rights as homosexuals. In one particular case, such defenders had to go into hiding, fearing for their physical safety and psychological integrity following the publication of their names and pictures in newspapers.

19. Stereotypical portrayals and insults have also been used against women defenders working on issues such as rape, domestic violence and female genital mutilation.

20. The Special Rapporteur calls upon non-State actors to respect all human rights, and, in that regard, she would like to outline the responsibility of non-State actors to respect human rights in accordance with the Declaration.

B. Responsibility of non-State actors to respect the rights of human rights defenders

21. At the outset, the Special Rapporteur would like to recall that non-State actors, including private companies, have an obligation to comply with national laws in conformity with international standards and norms. Consequently, non-State actors can be held accountable for violations of the rights of defenders amounting to offences or crimes under national law. In addition, the Human Rights Council, in its resolution 12/2, condemns “all acts of intimidation or reprisal by non-State actors against individuals and groups who seek to cooperate or have cooperated with the United Nations, its representatives and mechanisms in the field of human rights”.

Responsibility to respect the rights of human rights defenders

22. The Declaration reaffirms the responsibility of everyone not to violate the rights of others, encompassing the responsibility of non-State actors to respect the rights of human rights defenders. This is reflected in the preamble as well as in articles 11, 12.3 and 19 of the Declaration. This responsibility to respect human rights, including the rights of defenders, means that non-State actors should at all times refrain from curtailing the enjoyment of human rights by defenders. In other

⁴ See E/CN.4/2006/95/Add.2, para. 87, and E/CN.4/2002/106/Add.1, para. 155.

words, all non-State actors, including armed groups, the media, faith-based groups, communities, companies and individuals should refrain from taking any measures that would result in preventing defenders from exercising their rights. On the contrary, non-State actors can, and should, play a preventive role by promoting the Declaration as well as the rights and activities of human rights defenders. All individuals, groups and organs of society should contribute to the effective promotion, protection and implementation of human rights.

Corporate responsibility to respect human rights

23. In relation to private national or transnational corporations, the Special Rapporteur refers to the responsibility of companies to respect human rights, as emphasized by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Mr. John Ruggie, in his report to the Human Rights Council (A/HRC/8/5), submitted in 2008. The Human Rights Council endorsed the Special Representative's policy framework for business and human rights, as elaborated in his report. The framework rests on the three principles of "protect, respect and remedy": the State duty to protect against human rights abuses by third parties, including businesses; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The Human Rights Council later emphasized that transnational corporations and other business enterprises have a responsibility to respect human rights (see Human Rights Council resolution 8/7). Consequently, business enterprises also have a responsibility to respect the rights of human rights defenders.

24. The corporate responsibility to respect human rights (see A/HRC/14/27, paras. 54-78) is recognized in soft-law instruments such as the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, and it constitutes one of the commitments that companies undertake when joining the United Nations Global Compact.⁵ The corporate responsibility to respect notably applies to the rights enshrined in the International Bill of Human Rights.⁶ Therefore, the rights enshrined in the Declaration on human rights defenders, such as the right to security and liberty, freedom of association and freedom of opinion and expression, including access to information, must be respected by companies, whether national or transnational. Examples of alleged violations of those rights by companies are provided above.

25. The Special Representative also stated that discharging the responsibility to respect human rights required due diligence. This concept, which is derived from, but should be distinguished from, a State's due diligence responsibility, should be understood to mean that companies must ensure that their activities do not infringe upon the rights of others, including human rights defenders. This implies that companies should identify and prevent human rights violations against defenders that may result from their activities and operations. The Special Rapporteur would like to call upon companies to engage with human rights defenders while implementing the

⁵ See the United Nations Global Compact's 10 principles, notably principles 1 and 2; available at <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html>.

⁶ The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

four components of the human rights due diligence standard, as elaborated by the Special Representative of the Secretary-General on business and human rights.⁷

26. In addition, companies should envisage incorporating a reference to the Declaration on human rights defenders into their corporate social responsibility and/or human rights policies. Transnational corporations should also systematically consider involving human rights defenders in their country assessment prior to undertaking any investment in a given State. Early and transparent discussions on the consequences of the activities of companies on the enjoyment of human rights in their areas of operation could prevent violations of the human rights of populations, communities and defenders. Such a participatory process would also contribute to an acknowledgment of the key role of defenders in the promotion of human rights, democracy and good governance. Transnational companies could also play a key role in influencing their national parent companies and overseas subsidiaries to adopt the same approach.

27. Transnational and national companies should also consider developing national human rights policies in cooperation with defenders, including monitoring and accountability mechanisms in case of violations of the rights of human rights defenders.

III. The responsibility of States for human rights violations by non-State actors

28. The responsibility of non-State actors to respect the rights of human rights defenders does not relieve the State of its obligations under human rights law to respect, protect and fulfil human rights,⁸ including those of human rights defenders.

29. Indeed, States are primarily responsible for the protection of human rights defenders and their rights, and the Special Rapporteur would like to recall that they should improve or develop specific protection programmes for defenders. In this connection, the Special Rapporteur would like to refer to the previous recommendations in that regard (see A/HRC/13/22). In the context of human rights violations by third parties, the obligation to protect, first, involves ensuring that defenders do not suffer from violations of their rights by non-State actors. Failure to protect could, in particular circumstances, engage the State's responsibility. Secondly, States should provide defenders victims of human rights violations with an effective remedy. To that end, all violations of the rights of defenders should be investigated promptly and impartially and perpetrators prosecuted. Fighting impunity for violations committed against defenders is crucial in order to enable defenders to work in a safe and conducive environment.

⁷ See A/HRC/8/5, paras. 56-64, and A/HRC/14/27, paras. 79-86.

⁸ For a definition of these obligations, see E/CN.4/Sub.2/1987/23, paras. 66-69.

A. State responsibility for acts of non-State actors under international law

1. State duty to protect defenders from human rights violations committed by third parties

30. The State's duty to protect the rights of defenders from violations committed by non-State actors is derived from each State's primary responsibility and duty to protect all human rights, as enshrined in article 2 of the International Covenant on Civil and Political Rights, which establishes the obligation of States to guarantee to all individuals within their territories and subject to their jurisdiction the rights recognized in the Covenant without discrimination.

31. As the Declaration on human rights defenders contains a series of principles and rights that are based on human rights standards enshrined in other legally binding international instruments such as the International Covenant on Civil and Political Rights, the State's duty to protect all human rights includes the protection of the rights of human rights defenders. Thus, for instance, the right to life, the right to privacy, and the rights to freedom of association and expression should be protected from violations not only by State agents, but also by private persons or entities. This duty, which should apply at all times, is provided for in the preamble to the Declaration as well as in its articles 2, 9 and 12.

32. In discharging their duty to protect, States parties to international and regional human rights instruments must implement the interim measures provided by international and regional human rights mechanisms, such as the precautionary measures granted by the Inter-American Commission on Human Rights, so as to prevent violations by non-State actors, including corporations.

33. In a recent case involving a transnational mining company, the Inter-American Commission on Human Rights requested that the concerned State suspend operation of a gold mine owned by a transnational corporation until the adoption of a decision on the merits of the petition associated with the request for precautionary measures. The State was also requested to adopt any other necessary measures to guarantee the life and physical safety of the members of the indigenous communities concerned and to plan and implement protection measures with the participation of the beneficiaries and/or their representatives, who should also be considered human rights defenders.⁹ Despite the decision granting precautionary measures, leaders of the communities peacefully protesting against the perceived negative effect of the mining on, notably, their right to water have been threatened and attacked.

Due diligence principle

34. The principle of due diligence, as first articulated by the Inter-American Court of Human Rights in the case of *Velásquez-Rodríguez v. Honduras*, provides a way to

⁹ Inter-American Commission on Human Rights, Precautionary measure 260-07, Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala.

assess whether the State has acted in fulfilment of its human rights obligations.¹⁰ In relation to the Declaration, States should act with due diligence to prevent, investigate and punish any violation of the rights enshrined in the Declaration. In other words, States should prevent violations of the rights of defenders under their jurisdiction by taking legal, judicial, administrative and all other measures to ensure the full enjoyment by defenders of their rights; investigating alleged violations; prosecuting alleged perpetrators; and providing defenders with remedies and reparation.

35. Examples of actions or omissions contravening the State duty of due diligence include failure to provide effective protection to defenders at risk who have documented attacks and threats by non-State actors or who have been granted interim protection measures by regional human rights mechanisms. In relation to the above-mentioned case,⁹ despite the precautionary measures granted by the Inter-American Commission on Human Rights to the leaders of certain communities, information received by the Special Rapporteur indicates that violence against defenders continues. One of the community leaders of the movement against the mine was shot by unidentified men in July 2010. Failure to prevent violations of the rights of defenders may also include the removal of protection measures without due justification when the original threat is still present and the failure to investigate recurrent attacks and alleged violations against defenders.

36. Whenever States have not taken preventive measures, or when such measures have not proved sufficient to prevent the commission of violations of the rights of defenders by non-State actors, the State should carry out prompt, impartial and thorough investigations, prosecute the alleged perpetrators and provide the victim with reparations. Failure to take proper steps to investigate the alleged violations and to prosecute and try the perpetrator contravenes the principle of due diligence. It is of paramount importance that, in discharging this duty, States act in good faith.

Extraterritorial jurisdiction for human rights violations against defenders

37. In relation to transnational corporations, States have the duty to protect defenders against human rights violations committed by corporations within their jurisdiction. This duty first entails a duty to prevent human rights abuses against defenders by companies. States should at least take the appropriate legislative, administrative and judicial measures to prevent acts by transnational corporations registered in their countries that have a negative impact on the enjoyment of rights of defenders abroad. Furthermore, General Comment 19 of the Committee on Economic, Social and Cultural Rights, on the right to social security, could apply to violations committed against defenders, meaning that States could develop preventive mechanisms such as corporate social responsibility guidelines or policies and include not only references to international human rights standards, but also clear guidelines to protect human rights defenders.¹¹ These guidelines could include explicit references to: the Declaration on human rights defenders; the need for transparent consultation with defenders when carrying out a country assessment; the

¹⁰ See Inter-American Court of Human Rights, Velásquez-Rodríguez case, Judgement of 29 July 1988, para. 172; and United Nations Human Rights Committee General Comment No. 31, "Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (CCPR/C/21/Rev.1/Add.13), para. 8.

¹¹ See E/C.12/GC/19, para. 54.

advantage of developing a national human rights policy in consultation with human rights defenders; and the acknowledgement of defenders' role in that regard.

38. The duty to protect also requires prompt and impartial investigation and the prosecution of alleged perpetrators. Thus, the development of State corporate social responsibility policies should also include monitoring and accountability mechanisms to remedy potential violations of the rights of defenders.

39. This duty should also be reflected in any existing guidelines on human rights defenders. For example, the objective of the European Union of influencing third countries to carry out their obligations to respect the rights of human rights defenders and to protect them from attacks and threats from non-State actors should be accompanied, as a corollary, with the objective of influencing companies within their jurisdictions to respect the rights of human rights defenders.¹²

2. State accountability for acts of non-State actors

40. International law on State responsibility could apply to violations of the fundamental rights of defenders committed by certain categories of non-State actors under particular circumstances. For example, pursuant to the draft articles on Responsibility of States for Internationally Wrongful Acts,¹³ States may be held internationally responsible for violations of the rights of defenders, even though committed by non-State actors.¹⁴ Accountability, however, must be determined on a case-by-case basis. The Special Rapporteur would like to emphasize one instance in particular.

41. Pursuant to article 8 of the draft articles on State responsibility,¹⁵ acts and omissions committed by non-State actors under the instructions, control or direction of the State can, under certain circumstances, give rise to State responsibility. One example of a situation might be the case of a State creating or equipping armed groups, such as paramilitaries or armed bands, and instructing them to attack human rights defenders. In this instance, paramilitaries could be considered *de facto* State organs, and the commission of acts in breach of international law against defenders could be attributed to the State.¹⁶

¹² European Union Guidelines on Human Rights Defenders, para. 11, available at <http://www.consilium.europa.eu/showpage.aspx?id=1706&lang=fr>.

¹³ See A/56/10, para. 77; these articles apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole.

¹⁴ On the elements of an internationally wrongful act of a State, see article 2 of the draft articles on State responsibility.

¹⁵ Article 8 of the draft articles on State responsibility provides that "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

¹⁶ See, for example, International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Tadić*, Judgment, 15 July 1999, para. 131; available at <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

B. Implementing the right to an effective remedy

42. One of the major and systematic concerns raised by defenders in relation to violations committed by non-State actors is the question of impunity. The Special Rapporteur would like to reiterate that ending impunity is a *sine qua non* condition for ensuring the security of defenders.

43. Information received by the Special Rapporteur shows that in many instances, complaints by defenders about alleged violations of their rights are either never investigated or dismissed without justification. In certain cases involving threats received by text message, for example, the telephone numbers of the senders (when known) have been transmitted to the police for further investigation. The information provided shows that in most cases, no proper investigation was carried out by the police.¹⁷ Furthermore, in certain States affected by internal conflict, impunity has been unchecked with regard to cases of rape and the use of sexual and other forms of violence against women.¹⁸ Consequently, the State's unwillingness to investigate violations committed by non-State actors is seen as granting those responsible free rein further to attack defenders with total impunity.

44. Pursuant to article 9 of the Declaration, everyone has the right to benefit from an effective remedy and to be protected in the event of the violation of his/her human rights and fundamental freedoms. States therefore have a responsibility to ensure that human rights defenders whose rights have been violated are provided with an effective remedy. This obligation entails that the State ensures, without undue delay, a prompt and impartial investigation into the alleged violations, the prosecution of the perpetrators regardless of their status, the provision of redress, including appropriate compensation to victims, as well as the enforcement of the decisions or judgements. Failure to do so often leads to further attacks against human rights defenders and further violates their rights.

45. This right to an effective remedy is reflected in other human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Article 2(3) of the latter provides that States parties should ensure that "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". It further states that States parties should ensure that "any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy". This obligation includes providing defenders with reparations.¹⁹

46. The Special Rapporteur concurs with the opinion of the Human Rights Committee that "failure by a State Party to investigate allegations of violations

¹⁷ See, for instance, summaries of individual cases raised by the Special Rapporteur on human rights defenders during 2009 and summaries of Government responses (A/HRC/13/22/Add.1 and Corr.1, paras. 696-703, and 1805).

¹⁸ See, for instance, summaries of individual cases transmitted and replies received by the Special Rapporteur on human rights defenders during 2005 (E/CN.4/2006/95/Add.1 and Corr.1 and 2, para. 166).

¹⁹ Human Rights Committee General Comment No. 31, "Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (CCPR/C/21/Rev.1/Add.13), para. 16.

could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy".²⁰ The Special Rapporteur would like to emphasize that States should also investigate threats committed against families and relatives of human rights defenders.

47. The right to an effective remedy also implies an effective access to justice, which should be understood as not only judicial but also administrative or quasi-judicial mechanisms. Investigation and prosecution should rest on an effective and independent judiciary. Unfortunately, in many instances, weaknesses in the judicial system and flaws in the legal framework have deprived defenders of adequate tools for seeking and obtaining justice.

48. States should take steps to ensure that violations against human rights defenders can be brought before tribunals or alternative complaints mechanisms such as national human rights institutions or existing or future truth and reconciliation mechanisms.

49. As mentioned by the Special Rapporteur on previous occasions, national human rights institutions could play a leading role whenever States' judicial systems are unable or unwilling to adjudicate on alleged violations against defenders. The Special Rapporteur would like to stress the important role that independent and effective national human rights institutions could play in handling complaints against non-State actors, including private corporations.

50. Whenever national human rights institutions are not able to address violations committed by private corporations, the possibility of amending their mandates so that they can receive and consider complaints of that nature should be envisaged. Such amendments should be discussed with defenders themselves to take into account the specific risks they encounter. National human rights institutions could also play a key preventive role in disseminating the Declaration to non-State actors and raising awareness about their responsibility to respect the rights of defenders.

IV. Conclusions and recommendations

51. The Special Rapporteur hopes that the present report will contribute to raising awareness of the responsibility of non-State actors to comply with the provisions of the Declaration on human rights defenders. It is paramount that non-State actors acknowledge the important role of defenders in ensuring the full enjoyment of all human rights by everyone. Non-State actors, including private companies, could play a key role in the promotion and protection of the rights and activities of human rights defenders.

52. The Special Rapporteur remains concerned at the alleged unwillingness of certain States to investigate promptly and impartially violations against defenders committed by third parties. She once more urges States to protect human rights defenders effectively and ensure that all human rights violations committed against defenders are investigated and prosecuted, regardless of the status of the perpetrators. The Special Rapporteur would like to make the following recommendations.

²⁰ Ibid., para. 15.

To all non-State actors

- 53. **Respect the rights of human rights defenders in accordance with the Declaration on human rights defenders.**
- 54. **Refrain from violating the rights of human rights defenders and hindering their activities at all times.**
- 55. **Promote the role and activities of human rights defenders.**

To national and transnational corporations

- 56. **Involve and consult with human rights defenders when carrying out country assessments.**
- 57. **Develop national human rights policies in cooperation with defenders, including monitoring and accountability mechanisms for violations of the rights of defenders.**
- 58. **Fully implement the recommendations of the Special Representative of the Secretary-General on business and human rights on the corporate responsibility to respect.**
- 59. **Act with due diligence and ensure that their activities will not infringe the rights of others, including human rights defenders.**
- 60. **Promote the role and activities of human rights defenders.**

To States

- 61. **Incorporate the Declaration on human rights defenders into domestic law.**
- 62. **Disseminate the Declaration not only among State agents but also to individuals, groups and organs of society and other non-State actors, including faith-based groups, the media, private and State-owned companies.**
- 63. **Respect and protect the rights of human rights defenders in accordance with the Declaration on human rights defenders.**
- 64. **Implement the interim measures of protection granted by international and regional human rights mechanisms to human rights defenders by, inter alia, taking immediate steps to provide them with appropriate protection.**
- 65. **Implement the recommendations on the improvement or establishment of specific protection programmes for defenders as elaborated in the Special Rapporteur's report on the security and protection of human rights defenders.²¹**
- 66. **Ensure prompt and independent investigation of all violations of the rights of defenders, the prosecution of alleged perpetrators regardless of their status, and provide victims of violations with access to justice and just and effective remedies, including appropriate compensation.**
- 67. **Take measures to ensure that public officials and law enforcement officers in charge of the prevention, investigation and prosecution of violations against**

²¹ See A/HRC/13/22.

human rights defenders receive training on the Declaration and on the specific needs of protection of human rights defenders.

68. Engage with national and transnational corporations operating under their respective jurisdictions to disseminate the Declaration and ensure that prevention and accountability mechanisms for human rights violations against human rights defenders are established.

69. Extend the mandate of their national human rights institutions to receive complaints against private companies.

70. Ratify and entrench in the domestic legal system the Statute of the International Criminal Court as well as the Agreement on Privileges and Immunities of the Court.

71. In cases where any non-State actors, particularly paramilitaries, attempt to stigmatize the work of human rights defenders through acts such as alleging their association with combatant or terrorist groups, publicly reaffirm the importance and legitimacy of the work carried out by human rights defenders.

72. Promote the role and activities of human rights defenders.

To national human rights institutions

73. Investigate complaints about human rights violations committed by non-State actors, including companies, whenever their mandates allow.

74. Disseminate the Declaration on human rights defenders among individuals, groups and organs of society and other non-State actors, including faith-based groups, the media, and private and State-owned companies.

75. Organize awareness-raising conferences and seminars on the corporate responsibility to respect human rights.

To the International Criminal Court

76. Take appropriate steps to ensure that crimes under international law committed by non-State actors and falling within its mandate are investigated and prosecuted.

To human rights defenders

77. Report all violations of their human rights to the relevant authorities.

78. Continue to submit complaints and/or communications to regional and international human rights mechanisms and national human rights institutions.

79. Monitor the above recommendations and communicate any violations to the Special Rapporteur on human rights defenders.

To the Office of the High Commissioner for Human Rights

80. Develop a comprehensive strategy to protect human rights defenders, including against threats and reprisals by non-State actors.



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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Protecting human rights and fundamental freedoms while countering terrorism

Report of the Secretary-General

Summary

The General Assembly, in resolution 64/168, reaffirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular human rights, refugee and humanitarian law, and urged States countering terrorism to fully comply with their obligations under international law, including in a number of specific areas. The present report is submitted pursuant to that resolution. It refers to recent developments within the United Nations system in relation to human rights and counter-terrorism, including through the activities of the Office of the United Nations High Commissioner for Human Rights, the Human Rights Council and its various special procedures mandates, the human rights treaty bodies, the Counter-Terrorism Implementation Task Force and its Working Group on Protecting Human Rights while Countering Terrorism, the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate. It reports on the consideration by the United Nations human rights system of issues, including compliance of legislation, policies and practices for countering terrorism with international law, including international human rights law.

* A/65/150.



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I. Introduction

1. In its resolution 64/168 the General Assembly, inter alia, (a) expressed serious concern at the occurrence of violations of human rights and fundamental freedoms, as well as international refugee and humanitarian law, committed in the context of countering terrorism; (b) urged States countering terrorism to fully comply with their obligations under international law, including with regard to the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment; ensure that all persons deprived of liberty benefit from the guarantees to which they are entitled under international law, including the review of the detention and other fundamental judicial guarantees; ensure that no form of deprivation of liberty places a detained person outside the protection of the law; ensure due process obligations and the right to a fair trial; respect non-refoulement obligations; ensure legality in the criminalization of acts of terrorism; and ensure the right to an effective remedy; (c) highlighted the need to protect all human rights, including economic, social and cultural rights; (d) noted the need to continue ensuring that fair and clear procedures under the United Nations terrorism-related sanctions regime are strengthened to enhance their efficiency and transparency; (e) urged States to ensure the rule of law and to include adequate human rights guarantees in their national listing procedures; (f) requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to continue to contribute to the work of the Counter-Terrorism Implementation Task Force, including by raising awareness on the need to protect human rights and the rule of law while countering terrorism; and (g) encouraged the Security Council and its Counter-Terrorism Committee to strengthen dialogue with relevant human rights bodies, in particular with OHCHR, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, other relevant special procedures and mechanisms of the Human Rights Council and relevant treaty bodies.

2. I was requested to submit a report on the implementation of resolution 64/168 to the General Assembly at its sixty-fifth session. The present report also responds to the request of the former Commission on Human Rights for the High Commissioner to report to the General Assembly on the implementation of Commission resolution 2005/80. The report refers to recent developments within the United Nations system in relation to human rights and counter-terrorism, including through the activities of the United Nations High Commissioner for Human Rights, OHCHR, the Human Rights Council and its various special procedures, the human rights treaty bodies, the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate, and the Counter-Terrorism Implementation Task Force and its Working Group on Protecting Human Rights while Countering Terrorism.

II. Recent developments in the United Nations in the area of human rights and counter-terrorism

A. United Nations Global Counter-Terrorism Strategy and the Counter-Terrorism Implementation Task Force

3. The Counter-Terrorism Implementation Task Force continues to work to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system. The Working Group on Protecting Human Rights While Countering Terrorism, led by OHCHR,¹ continues to assist States in implementing the human rights aspects of the United Nations Global Counter-Terrorism Strategy, in particular those contained in the fourth pillar, entitled "Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism". A detailed overview of the activities of the Counter-Terrorism Implementation Task Force and its Working Groups is contained in the forthcoming report of the Secretary-General on the United Nations Global Counter-Terrorism Strategy.

4. The Working Group has focused on the development of a set of basic human rights reference guides to assist Member States in strengthening the protection of human rights in the context of counter-terrorism. These tools aim to provide guidance to State authorities, national and international non-governmental organizations, legal practitioners, and United Nations agencies, as well as individuals, on how human rights compliant measures may be adopted in a number of counter-terrorism areas. The first five guides deal with the stopping and searching of persons, security infrastructure, detention in the context of counter-terrorism, the principle of legality in national counter-terrorism legislation and the proscription of organizations. The Working Group aims to present the first two guides during the review of the Global Counter-Terrorism Strategy by the General Assembly in September 2010.

5. All guides have the same format: an introduction, which sets forth definitions, key issues and the purpose of the guide, followed by a series of guiding principles, guidelines and reference materials. The guide on stopping and searching recalls that all stop and search measures to counter-terrorism must comply with international human rights law. It focuses on the impact that stop and search measures may have on the right to personal integrity and dignity, the principles of equality and non-discrimination, the right to freedom of movement and the right to privacy. It highlights the need for appropriate safeguards and oversight in the adoption and the implementation of stop and search measures, as well as the conditions that need to be respected should a State need to restrict the enjoyment of human rights for the purpose of countering terrorism.

6. The guide on security infrastructure highlights that all measures to prevent and deter terrorist acts, including those related to security infrastructure, must fully

¹ Other members include the Special Rapporteur on the promotion and protection of human rights while countering terrorism, the United Nations Office on Drugs and Crime, the Counter-Terrorism Executive Directorate (CTED), the Office of Legal Affairs of the United Nations Secretariat, the United Nations Interregional Crime and Justice Research Institute, the World Bank, the International Maritime Organization and the 1267 Monitoring Committee; the Office for the Coordination of Humanitarian Affairs and INTERPOL participate as observers.

comply with States' international human rights obligations. It focuses on the impact that security infrastructure may have on the enjoyment of a range of human rights, including the principles of equality and non-discrimination, the right to freedom of movement, the right to seek asylum and the right to privacy. The guide also sets out the framework for limitations and derogations, and stresses the need for accountability where violations have occurred. Finally, the guide touches upon the impact of security infrastructure on the enjoyment of economic, social and cultural rights.

7. Other working groups of the Counter-Terrorism Implementation Task Force continue to address human rights issues in their work, including initiatives of the working group on highlighting and supporting victims, and the integrated assistance for countering terrorism initiative, through which the Task Force has developed a methodology to enable partnering Member States to address their requests for assistance related to all four pillars of the Global Strategy through one entry point.

B. Counter-Terrorism Committee/Counter-Terrorism Committee Executive Directorate

8. The Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate continue to take relevant human rights concerns into account in their work programmes focused on the implementation of Security Council resolutions 1373 (2001) and 1624 (2005). In line with the mandate provided by the General Assembly in its resolution 64/168, the Executive Directorate continued to liaise with OHCHR, the Special Rapporteur on the promotion and protection of human rights while countering terrorism, and other human rights entities. At the regional level, the Executive Directorate continued its dialogue on relevant human rights issues with the Council of Europe, including in the context of workshops in South-East Europe. The Executive Directorate organized two regional workshops for senior law enforcement and prosecution officials in South Asia, with the participation of OHCHR, in Dhaka from 8 to 10 November 2009 and in Colombo from 8 to 10 June 2010. It also continued its active participation in the work of the Counter-Terrorism Implementation Task Force working group on the protection of human rights while countering terrorism, chaired by OHCHR.

C. Human Rights Council

9. In its resolution 13/26 of 26 March 2010, the Human Rights Council again called upon States, inter alia, to ensure that any measure taken to counter terrorism complies with international law, in particular international human rights, refugee and humanitarian law, and to ensure that any person whose human rights have been violated has access to an effective remedy and that victims will receive adequate, effective and prompt reparations where appropriate. The Council also called upon States to safeguard the right to privacy and ensure that interferences with the right to privacy are regulated by law and subject to effective oversight and redress, including judicial review. It urged States to respect the right to be equal before the courts and tribunals, and to a fair trial, and further, to take all necessary steps to ensure that persons deprived of liberty enjoy the guarantees to which they are entitled under international law, including the review of their detention and other

fundamental judicial guarantees. The Council welcomed the decision by the Security Council in its resolution 1904 (2009) to establish an office of the Ombudsperson and requested the High Commissioner and the Special Rapporteur on the promotion and protection of human rights while countering terrorism to contribute further to the ongoing discussion regarding the efforts of Member States to assure adequate human rights guarantees to ensure fair and clear procedures, in particular with regard to placing on, reviewing and removing individuals and entities from terrorism-related sanctions lists. The Council invited the Office of the United Nations High Commissioner and the relevant special procedures of the Council to engage in further dialogue with the Security Council Counter-Terrorism Committee in order to promote a consistent approach to the protection of human rights and fundamental freedoms while countering terrorism, and would welcome further efforts by the Security Council Counter-Terrorism and 1267 Committees, in the fulfilment of their respective mandates, to integrate a human rights approach into its counter-terrorism objectives.

10. The Human Rights Council, in its resolution 13/19 of 26 March 2010, also addressed the role and responsibility of judges, prosecutors and lawyers in safeguarding the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It urged States to ensure the proper functioning of the administration of justice, in particular by enabling the judiciary to exercise its judicial functions independently, impartially and professionally; taking effective measures to prevent and combat any unlawful interference of any kind, such as threats, harassment, intimidation and assaults on judges, prosecutors and lawyers, as well as ensuring that any such interference is promptly, effectively, independently and impartially investigated with a view to bringing those responsible to justice; and taking effective measures for combating corruption in the administration of justice, establishing proper legal aid programmes and having judges, prosecutors and lawyers adequately and in sufficient numbers selected, trained and remunerated. The Council called upon States to ensure that all judges, prosecutors and lawyers are educated and informed regarding the absolute prohibition of torture. It condemned any action or attempt by State officials to legalize, authorize or acquiesce in torture, including on grounds of national security, and called upon States to ensure accountability for acts of torture and to adopt legal and procedural safeguards, including an effective judicial review mechanism of the implementation and compliance with such safeguards.

11. The Council drew attention to the interference of counter-terrorism measures with the freedom of opinion and expression in its resolution 12/16 of 12 October 2009. It called upon States to refrain from using counter-terrorism as a pretext to restrict the right to freedom of opinion and expression. It expressed its concern that violations often occur related to surveillance, censorship, intimidation, persecution, arbitrary detention, torture and extrajudicial killing of persons who exercise and promote this right, including journalists and human rights defenders. These violations are facilitated and aggravated by the abuse of states of emergency. In its resolution 13/13 of 25 March 2010, the Human Rights Council expressed its concern that national security and counter-terrorism measures have been misused to target human rights defenders or have hindered their work and endangered their safety.

Universal periodic review

12. The Human Rights Council also addressed questions related to human rights and counter-terrorism in its recommendations to States under the universal periodic review. Recommendations included the need to ensure that legislation and policies for countering terrorism comply with States' international obligations related to human rights, international humanitarian law and refugee law.² A recurring issue of concern was respect for due process and fair trial guarantees,³ including the use of *incommunicado* detention.⁴ Other recommendations encouraged States to narrow the definition of terrorism,⁵ and to introduce a moratorium on the death penalty in all cases.⁶ The Working Group recommended that one State lift its long-standing state of emergency and replace it with a counter-terrorism law in accordance with human rights standards.⁷ The recommendations of the universal periodic review also underscored the importance of respecting human rights, including freedom of expression,⁸ assembly⁹ and religion,¹⁰ and the right to privacy,¹¹ while combating terrorism. Concerns were raised about the rights of the child and non-compliance by some States with the standards reflected in the Convention on the Rights of the Child,¹² including the trial of children as adults according to anti-terrorism legislation.¹³ Recommendations were also made to States to combat terrorism financing¹⁴ and terrorism on the Internet,¹⁵ and to intensify cooperation with other countries in the fight against terrorism.¹⁶ States were encouraged to give attention and provide adequate follow-up to the recommendations of the Special Rapporteur on the promotion and protection of human rights while countering terrorism following his visit to the respective countries¹⁷ and to allow him free access to detention centres and communication with detainees.¹⁸

Special procedures

13. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances conducted, as part of a consultative process with States, a joint study on global practices in relation to secret detention in the context of countering terrorism (see

² See A/HRC/13/11 and Add.1 and Corr.1, para. 101.82; A/HRC/14/17 and Add.1, para. 95.116; A/HRC/15/6, para. 85.28.

³ See A/HRC/13/17, para. 97.91; A/HRC/14/10 and Add.1, para. 95.62; A/HRC/15/6, para. 87.15.

⁴ See A/HRC/15/6, paras. 87.4 and 87.6.

⁵ See A/HRC/13/17, para. 99.32.

⁶ See A/HRC/14/10 and Add.1, para. 97.18.

⁷ See A/HRC/14/17 and Add.1, paras. 95.79, 95.80, 95.112, 95.113, 95.115.

⁸ See A/HRC/13/5 and Add.1 and Corr.1, para. 105.39; A/HRC/13/17, para. 97.91.

⁹ See A/HRC/13/17, para. 97.91.

¹⁰ See A/HRC/13/5 and Add.1 and Corr.1, para. 105.39.

¹¹ *Ibid.*, para. 105.40.

¹² See A/HRC/15/13, para. 100.87.

¹³ *Ibid.*, para. 102.7.

¹⁴ See A/HRC/15/2 and Add.1, para. 76.124.

¹⁵ See A/HRC/15/11, para. 96.48.

¹⁶ See A/HRC/15/6, para. 85.29.

¹⁷ See A/HRC/14/17, para. 95.25; A/HRC/15/6, para. 87.17.

¹⁸ See A/HRC/14/17 and Add.1, para. 99.11.

A/HRC/13/42). The study describes the international legal framework applicable to secret detention; provides an historical overview of the use of secret detention; addresses the use of secret detention in the context of the so-called global war on terror post 11 September 2001; and highlights examples relating to about 66 States from various geographical regions, that appear to have been implicated in instances of secret detention in the context of counter-terrorism. It also cites the names of individuals who may have been affected by this practice. Owing to its global nature, the study is not exhaustive, but aims to highlight and illustrate through examples the widespread practice of secret detention and related impunity. The study concludes with recommendations aimed at curbing secret detention and the unlawful treatment or punishment of detainees in the context of counter-terrorism. The Council considered the study at its fourteenth session in June 2010.

14. The report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to the Human Rights Council (A/HRC/13/37 and Add.1-2) highlights concerns regarding the protection of the right to privacy in the fight against terrorism. The Special Rapporteur argues that article 17 of the International Covenant on Civil and Political Rights should be interpreted as containing elements of a permissible limitations test. In the absence of an exhaustive list of legitimate aims in article 17, the Special Rapporteur calls upon States to justify why a particular aim is legitimate justification for restrictions upon article 17. He also suggests that the Human Rights Committee should adopt a new general comment on article 17. The Special Rapporteur further highlights the erosion of the right to privacy in the fight against terrorism, which is occurring through the use of surveillance powers and new technologies without adequate legal safeguards. Without a rigorous set of legal safeguards and a means to measure the necessity, proportionality and reasonableness of the interference, States have no guidance on minimizing the risks to privacy generated by their new policies. The Special Rapporteur has identified some legal safeguards that have emerged through policymaking, jurisprudence, policy reviews and good practice from around the world.

15. In its resolution 10/15, the Human Rights Council requested the Special Rapporteur to prepare a compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, and to present the compilation in a report to the Council. To this end, an expert workshop was held on 1 and 2 March 2010, with the support of OHCHR. To ensure consultation with Member States and other relevant stakeholders, and their meaningful participation in the process concerning the preparation of the report, a questionnaire requesting information on good practices in accordance with resolution 10/15 was sent to all Member States. In addition, on 15 April 2010, the Special Rapporteur held a public consultation on such practices with Member States, of which 48 attended. The Special Rapporteur submitted a compilation of 35 identified elements of good practices for consideration by the Human Rights Council at its fourteenth session.¹⁷

16. At the invitation of the Government, the Special Rapporteur conducted a visit to Egypt from 17 to 21 April 2009. In his report the Special Rapporteur examined the emergency law, criminal law provisions on terrorist crimes, and amended article 179 of the Constitution, which provides the current legal framework to combat

¹⁷ See A/HRC/14/46 and Add.1.

terrorism in that country. He analysed some of the key issues and challenges that are expected to be addressed in the new anti-terrorism legislation under preparation, to which the Government has committed to enact in order to lift the state of emergency that has been in force, almost continuously, for more than 50 years. The Special Rapporteur also discussed the importance of a strict definition of the concept of terrorism and examined the renewal of detention orders and lack of compliance with court rulings regarding release. He also examined the use of special courts to try terrorist suspects, including the use of emergency security courts and military courts, and called for measures to ensure compliance with fair trial guarantees. Finally, he noted Egypt's leadership role, particularly in the region, in regard to the international fight against terrorism and expressed concern regarding the use of extraordinary renditions.

17. The report of the Special Rapporteur to the General Assembly at its sixty-fourth session (A/64/211 and Corr.1) offers an analysis of counter-terrorism measures from a gender perspective. It expands upon earlier reports of the Special Rapporteur to provide a comprehensive overview of the frequency and nature of gender-based human rights abuses in counter-terrorism measures and to explore the complex relationship between gender equality and countering terrorism.

18. The Special Rapporteur on summary, extrajudicial or arbitrary executions addressed the question of targeted killings in his report to the Human Rights Council at its fourteenth session (A/HRC/14/24/Add.6). He identified modern practices on targeted killings and focused on the recent increased use of targeted killings by a number of States in the context of armed conflict, as well as counter-terrorism and counter-insurgency operations. The report focused on new technologies used in recent years for targeted killings, including unmanned armed vehicles commonly known as drones, and identified States that have or are reportedly seeking such technology. The report describes the publicly available information about new targeted killing policies and addresses the main legal issues that have arisen. It identifies areas in which legal frameworks have been clearly violated or expanded beyond their permissible limits; where legal issues are unclear, it suggests approaches that would enable the international community to return to a normative framework that is consistent with its deep commitment to protection of the right to life, and the minimization of exceptions to that constitutive principle. The report also considers law enforcement "shoot-to-kill" policies that, in their premeditation, intent and identification of specific targets, may be considered examples of targeted killings.

19. The Special Rapporteur on freedom of religion or belief reported on allegations that national policies, legislation and practices that are designed to combat terrorism have had, and continue to have, adverse effects on the enjoyment of freedom of religion or belief worldwide (see A/64/159). According to the report of the Special Rapporteur, certain groups, such as migrants, asylum-seekers or members of particular national, racial or religious groups, seem to be specifically targeted. While States are obliged to take effective measures to combat terrorism, the Special Rapporteur emphasized that they also must ensure that counter-terrorism measures comply with their obligations under international law, in particular international human rights, refugee and humanitarian law.

20. The Special Rapporteur on the situation of human rights defenders addressed the issue of security and protection of human rights defenders in her most recent

report to the Human Rights Council (A/HRC/13/22, Add.1-4 and Corr.1). The Special Rapporteur noted that in certain countries human rights defenders are characterized as "terrorists", which contributes to the perception that defenders are legitimate targets for State and non-State actors. She also noted that in the context of counter-terrorism efforts some States continue to resort to ambiguous security laws to arrest and detain human rights defenders, often without charges. In some States, national intelligence and security services have the power to detain human rights defenders without charge for a prolonged period of time. In some instances, agents of intelligence and security services are granted immunity from prosecution and can therefore commit human rights violations against defenders in total impunity.

21. In her report to the Human Rights Council (A/HRC/13/23 and Add.1-3) at its thirteenth session, the Independent Expert on minority issues highlighted concerns over counter-terrorism measures in the context of her official visit to Canada, which took place from 13 to 23 October 2009. She called for Canada to ensure that counter-terrorism measures meet human rights standards and avoid profiling. Members of Muslim and Arab communities reported that Government policies post September 2001 have made them feel targeted, profiled and harassed. They described indiscriminate, unfair and unjust treatment by federal, provincial or territorial authorities, and racial profiling in the use of security certificates based on unsubstantiated information. The Independent Expert urged that steps be taken to address these concerns, answer allegations, and build positive relations and confidence among communities that feel targeted by national security legislation. The security certificates process in Canada is based on provisions of the Immigration and Refugee Protection Act (2001). Certificates can be issued to non-citizens as a preliminary step to detain and deport individuals on national security grounds. Numerous civil society groups claim that the powers authorized under these laws are used indiscriminately and are targeted against Muslims and Arabs, resulting in discriminatory impact. The Government noted that the security certificate process is a legal immigration proceeding and not a criminal proceeding and that it is neither arbitrary nor indiscriminate. Its aim is to remove non-Canadians who pose a serious threat to national security or public safety.

22. In the report on her visit to Kazakhstan from 6 to 15 July 2009 (A/HRC/13/23/Add.1), the Independent Expert noted concerns expressed by civil society and some "non-traditional" religious groups that the Government has, without cause, attempted to justify restrictive policies and the activities of national security agencies on the grounds of "the fight against separatism, extremism and terrorism". Such groups complain of discriminatory registration practices, public statements and publications by the Government warning the population against certain religious faiths, the unjustified confiscation of property, the imposition of fines, arrests, deportations and other abuses of power by police, national security agents and bureaucrats that appear to constitute repression of religious groups. The Independent Expert stressed her concern about such practices, justified on national security grounds, and noted that the Government must not determine that someone's belief system or activities constitute a threat to national stability or individual security that is punishable without the commission of a criminal act.

23. The Special Rapporteur on the human rights of migrants addressed issues related to the protection of human rights in the context of countering terrorism. In his report following his country visit to the United Kingdom of Great Britain and Northern Ireland (see A/HRC/14/30/Add.3), he welcomed the revisions undertaken

in 2006 and 2009 to the long-term strategy for countering international terrorism, by virtue of which the observance of international law and human rights standards and the promotion of good governance were included as guiding principles in all counter-terrorism efforts. However, he expressed concern about the human rights implications of the use of the grounds of "national security" and the "terrorism threat" to deprive non-nationals legally married to British nationals of the right to stay in the territory of the United Kingdom. He noted his concern about allegations of disproportionate scrutiny and instances of psychological mistreatment of persons entering the United Kingdom with valid documentation and regretted that this kind of situation fuels a climate of mistrust and intolerance at entry checkpoints. He also expressed concern on allegations about interrogation and excessive delays at airports, which in some instances have caused financial or other harm to persons in transit or entering the country, sometimes for short-term visits. He observed with dismay that these practices were based on race, colour, descent or national or ethnic origin and, in some instances, pregnancy status.

24. In this regard, the Special Rapporteur on the human rights of migrants recalled that, in his view, these allegations contrast with principles of human dignity and appear inconsistent with the *jus cogens* prohibition of discrimination. He further recommended that the Government ensure in law and practice respect for the prohibition of discrimination and establish monitoring mechanisms to avoid disproportionate scrutiny and psychological mistreatment of persons entering the United Kingdom with valid documentation. He also recommended that the Government take all necessary measures to prohibit in law and practice the use of profiles that reflect unexamined generalizations, such as profiling based on ethnic or national origin or religion.

25. In its annual report (A/HRC/13/30 and Add.1-3), the Working Group on Arbitrary Detention expressed concern about the continuing practice of States to apply administrative detention regimes, including in the fight against cross-border terrorism. It reiterated the need to strengthen the institution of habeas corpus to combat arbitrary detention.

26. After its eighty-seventh session in March 2009, the Working Group on Enforced or Involuntary Disappearances transmitted general allegations to the Governments of Azerbaijan, Bosnia and Herzegovina, Cyprus, Czech Republic, Denmark, Germany, Ireland, Italy, the former Yugoslav Republic of Macedonia, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland, concerning their alleged past involvement in practices of renditions and/or secret detention. The summaries of these allegations and the replies of some Governments are contained in the report of the Working Group (A/HRC/13/31 and Add.1 and Corr.1). In its report, the Working Group also expressed concern about measures being taken in the context of counter-terrorism and their implications for enforced disappearances, including the enactment of legislation that restricts personal freedoms and weakens due process; random arrests committed during military operations; arbitrary detentions and extraordinary renditions, which amount to enforced disappearances. The Working Group called upon States to take legislative, judicial and administrative or other measures to deal with the issue. The Working Group recalled its general comment on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearances, which states that under no circumstances, including states of war or public emergency, can any State interests be invoked to justify or legitimize secret centres or places of

detention which, by definition, would violate the Declaration, without exception. In a press release dated 30 August 2009, the Working Group expressed its concern at, *inter alia*, measures being taken by Governments while countering terrorism and the implications for enforced disappearances, and stressed that arrests committed during military operations, arbitrary detentions and extraordinary renditions can amount to enforced disappearances.

D. Human rights treaty bodies

27. The Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination continued to examine the compliance of States parties to the treaties with their legal obligations to respect human rights in the context of countering terrorism.

28. Major issues of concern to the Human Rights Committee and the Committee against Torture include alleged practices of torture and ill treatment of detainees, and violations of the principle of non-refoulement.²⁰ The Committees recalled that under no circumstances should States expel, return or extradite persons suspected of terrorism to a State where there are substantial grounds for believing that they would be in danger of being subjected to torture or ill treatment.²¹ The Committee against Torture reiterated that the absolute prohibition of torture is endangered by the continuing reliance on diplomatic assurances of countries known to resort to torture and by involvement in "extraordinary renditions" and secret detentions.²² In consideration of one State party report, the Human Rights Committee urged the State to exercise the utmost care in the use of diplomatic assurances, taking into account the fact that the more systematic the practice of torture, the less likely it will be that the risk of such treatment can be avoided by assurances.²³ It also recalled that no statements or confessions made under torture should be used as evidence for convictions.²⁴ In its consideration of another State party report, the Committee expressed its concern that allegations of a widespread practice of torture are seldom investigated and prosecuted, thereby favouring a climate of impunity.²⁵ In relation to another State party, the Committee against Torture reiterated its previous recommendation that the State party take appropriate legislative measures to guarantee detainees immediate access to a lawyer during police custody and make video recording of interrogations of all persons questioned.²⁶

²⁰ See CAT/C/JOR/CO/2 (2010), para. 23; CAT/C/SYR/CO/1 (2010), para. 18; CAT/C/YEM/CO/2/Rev.1 (2010), para. 22; CCPR/C/RUS/CO/6 and Add.1 and Corr.1 (2009), para. 17.

²¹ See CAT/C/JOR/CO/2 (2010), para. 23; CAT/C/SYR/CO/1 (2010), para. 18; CAT/C/AZE/CO/3 (2009), para. 22; CCPR/C/RUS/CO/6 and Add.1 and Corr.1 (2009), para. 17.

²² See CAT/C/JOR/CO/2 (2010), para. 23; CAT/C/SYR/CO/1 (2010), para. 18; CAT/C/YEM/CO/2/Rev.1 (2010), para. 11.

²³ See CCPR/C/RUS/CO/6 and Add.1 and Corr.1 (2009), para. 17.

²⁴ *Ibid.*, para. 8.

²⁵ See CAT/C/YEM/CO/2/Rev.1 (2010), para. 8.

²⁶ See CAT/C/JOR/CO/2 (2010), para. 23.

29. Other recurring issues of concern to the treaty bodies include the vague and broad definition of terrorism in many national legislations;²⁷ lack of safeguards related to due process and fair trial, including arbitrary arrest and indefinite detention without charge or trial;²⁸ incommunicado detention;²⁹ lack of immediate access to a lawyer and examination of the grounds for detention by a court;³⁰ lack of a review mechanism to challenge the designation as terrorist;³¹ the possibility of courts to receive or hear classified security information against terrorist suspects in their absence;³¹ infringements of the right to presumption of innocence;³² discriminatory application of counter-terrorism laws,³³ including excessive use of force against indigenous communities;³⁴ limitations to the right to privacy, such as interference in daily life by administrative "disturbance orders";³⁵ infringements of the rights of the child, including the prosecution of children on terrorist charges as adults without protection of juvenile justice standards,³⁶ extrajudicial killings of children allegedly fighting as guerrilla members,³⁷ life imprisonment,³⁸ inadequate legal representation and interpretation assistance,³⁹ prolonged periods of solitary confinement and abuse in inhumane and degrading conditions,³⁹ impossibility of family visits,³⁹ and recruitment of children to participate in terrorist activities.⁴⁰ Concern also was expressed over the discriminatory effect that counter-terrorism measures and legislation can have on the enjoyment of economic, social and cultural rights by certain groups, in particular ethnic minorities.⁴¹

III. Activities of the United Nations High Commissioner for Human Rights and of the Office of the United Nations High Commissioner for Human Rights

30. In line with General Assembly resolution 64/168 and Human Rights Council resolution 13/26, which encourage enhanced dialogue and cooperation between the Security Council and its Counter-Terrorism Committee, and OHCHR and relevant human rights bodies, in October 2009 the High Commissioner briefed the Counter-Terrorism Committee on key human rights issues that fall within the mandate of the Committee. The High Commissioner underscored that the time had come for the Security Council's counter-terrorism bodies to consider a broader approach in their vital work in this area, such as that adopted by the General Assembly in the Global

²⁷ See CAT/C/JOR/CO/2 (2010), para. 17; CAT/C/YEM/CO/2/Rev.1 (2010), para. 11; CCPR/C/TZA/CO/4 (2009), para. 12; CCPR/C/RUS/CO/6 and Add.1 and Corr.1 (2009), para. 7 (a); CRC/C/TUN/CO/3 (2010), para. 65.

²⁸ See CAT/C/YEM/CO/2/Rev.1 (2010), para. 11.

²⁹ See CAT/C/ESP/CO/5 (2009), para. 12.

³⁰ See CCPR/C/UZB/CO/3 (2010), para. 15.

³¹ See CCPR/C/NZL/CO/5 (2010), para. 13.

³² See CCPR/C/TZA/CO/4 (2009), para. 12.

³³ See CERD/C/CHL/CO/15-18 (2009), para. 15.

³⁴ See CCPR/C/NZL/CO/5 (2010), para. 14.

³⁵ See CCPR/C/NLD/CO/4 (2009), para. 15.

³⁶ See CRC/C/OPAC/TUR/CO/1 (2009), paras. 18 and 19.

³⁷ See CRC/C/OPAC/COL/CO/1 (2010), para. 8.

³⁸ See CRC/C/OPAC/TUR/CO/1 (2009), para. 18.

³⁹ See CRC/C/OPAC/ISR/CO/1 (2010), para. 34.

⁴⁰ See CRC/C/PAK/CO/3-4 (2009), paras. 80 and 81.

⁴¹ See E/C.12/KAZ/CO/1 (2010), para. 39.

Counter-Terrorism Strategy. She noted that because the Counter-Terrorism Committee and the United Nations human rights machinery review counter-terrorism laws and measures in parallel, better cooperation between them could provide additional legitimacy and coherence to the United Nations system as a whole. The High Commissioner noted the key role that could be played by the Counter-Terrorism Committee in placing the rule of law and human rights at the core of the fight against terrorism in areas, including the question of legality; the need to respect and protect non-derogable rights; the expansion of surveillance powers and capacities of law enforcement agencies, and the need to adequately protect the right to privacy; accountability for human rights violations; the issue of targeted sanctions, and the need for further improvements to ensure a fair and transparent listing process, including accessible and independent mechanisms for review; and issues regarding the proper integration of a human rights approach to the technical work of the Counter-Terrorism Committee.

31. In carrying out her mandate, the United Nations High Commissioner for Human Rights has continued to examine the question of the protection of human rights and fundamental freedoms while countering terrorism and to make general recommendations about the obligations of States in this regard. In her report to the Human Rights Council at its twelfth session, the High Commissioner analysed the links between economic, social and cultural rights, and terrorism and counter-terrorism measures.⁴² The High Commissioner urged States, when adopting exceptional counter-terrorism measures to pay particular attention to their impact on human rights, in particular economic, social and cultural rights, as these can have a particularly damaging effect on vulnerable communities, including the potential risk of leading to radicalization. She encouraged States to become party to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights once it is open for signature, and to develop national mechanisms to address the issue of remedies and reparations for victims of violations of economic, social and cultural rights. In developing counter-terrorism legislation, policies and measures, the High Commissioner urged States to examine their impact on economic, social and cultural rights in order to ensure that all the requirements relating to their protection are respected, including by ensuring the allocation of sufficient resources.

32. In her report to the Council at its thirteenth session, the High Commissioner addressed a number of challenges related to accountability for serious violations of human rights that have taken place in the context of counter-terrorism measures, as well as the rights of victims to remedy and reparations.⁴³ The High Commissioner noted her concern in relation to covert actions, which raise particular challenges for accountability as these are secretive in nature and involve classified information, and therefore may be beyond the purview of the legislature and judiciary. She recalled that all measures taken by law enforcement agencies must be lawful under national and international law, and compatible with States' human rights obligations. All activities undertaken by intelligence agencies must be regulated by law, monitored by independent agencies, and subject to judicial review. Where serious violations of human rights occur, States have the duty to ensure that such violations are properly investigated and, wherever possible, subject to a judicial or other appropriate response. The High Commissioner also highlighted States' obligations

⁴² See A/HRC/12/22.

⁴³ See A/HRC/13/36.

to respect the right to truth, justice and reparation, including not only the right to compensation and restitution, but also the right to rehabilitation, satisfaction and guarantees of non-repetition, as described by the United Nations set of principles for the protection and promotion of human rights through action to combat impunity.

33. In addition to its activities as Chair of the Counter-Terrorism Implementation Task Force Working Group on Protecting Human Rights While Countering Terrorism, as reflected in section II.A of the present report, the Office of the United Nations High Commissioner participated in an Arria formula meeting convened by the Government of Mexico in November 2009, with members of the Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights of the International Commission of Jurists on strengthening an integrated approach to human rights and counter-terrorism through the role of the Security Council. OHCHR also contributed to regional workshops for police officers and prosecutors in South Asia organized by the Counter-Terrorism Committee Executive Directorate in November 2009 in Dhaka, and in June 2010 in Colombo, by helping to lead working sessions that focused on ensuring respect for human rights in the course of operational activities related to counter-terrorism. In June 2010, the OHCHR Regional Office for Europe participated in a seminar organized by the Center on Global Counter-terrorism Cooperation, in cooperation with the Directorate for External Relations of the European Commission in Brussels, which focused on the work of the European Union on counter-terrorism while promoting and protecting human rights in the context of the United Nations Global Counter-Terrorism Strategy.

IV. Conclusions

34. The United Nations High Commissioner for Human Rights, the human rights treaty bodies, the Human Rights Council and its various special procedures continue to express grave concerns including with regard to practices of torture and ill treatment of detainees, and violations of the principle of non-refoulement, as well as the vague and broad definition of terrorism in national legislations; lack of safeguards related to due process and fair trial, including arbitrary arrest and indefinite detention without charge or trial; and incommunicado detention.

35. I urge Member States to fully implement the Global Strategy on Counter-Terrorism and to ensure respect for human rights and the rule of law as the fundamental basis of all counter-terrorism measures. All States countering terrorism must comply with their obligations under international law, in particular by ensuring respect for the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment; ensuring that all persons deprived of liberty benefit from the guarantees to which they are entitled under international law, including the review of the detention and other fundamental judicial guarantees; ensuring that no form of deprivation of liberty places a detained person outside the protection of the law; respecting due process obligations and the right to a fair trial; abiding fully by non-refoulement obligations; ensuring legality in the criminalization of acts of terrorism; and respecting the right to an effective remedy.

36. The Counter-Terrorism Implementation Task Force, its Working Groups and entities should continue to ensure respect for human rights and the rule of

law as the fundamental basis for their work in assisting Member States in implementing the Global Strategy.

37. The Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate are encouraged to continue in their efforts to place respect for the rule of law and human rights at the core of the fight against terrorism in areas within the scope of their mandates.
